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THE MODERN

LAW OF RAILWAYS

AS DETERMINED BY

THE COURTS AND STATUTES OF ENGLAND AND THE UNITED STATES.

BY

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THE LAW OF RAILWAYS.

CHAPTER XXIII.

RAILWAY MORTGAGES AND MORTGAGE TRUSTEES.

§ 602. Of the power of corporations in general to borrow and to mortgage.
§ 603. Of the power of railway companies to borrow and to mortgage.
§ 604. Statutes authorizing borrowing and mortgaging.
§ 605. Statutory restrictions—Exceptions in favor of current obligations—Lloyd's bonds.
§ 606. Of the extent of the statutory authority.
§ 607. Authority to guaranty the bonds of other corporations.
§ 608. Authority to mortgage property and to mortgage franchises, distinguished
§ 609. Of the authority of directors herein.
§ 610. Legislative recognition of *ultra vires* mortgage.
§ 611. Of the remedies of shareholders and creditors with respect to an *ultra vires* mortgage or debt.
§ 612. Of the manner of executing mortgages.
§ 613. Of defective and informal mortgages.
§ 614. The same subject, continued—Of bonds secured by statutory lien.
§ 615. Mortgages to be recorded.
§ 616. What property is covered by a mortgage.
§ 617. *(a).* Of the effect of general words of description.
§ 618. *(b).* Whether general words of description include future acquisitions.
§ 619. *(c).* Of choses in action and calls.
§ 620. *(d).* Of the effect of express words of futurity—Appurtenances.
§ 621. *(e).* Of fixtures.
§ 622. *(f).* Of rolling stock.
§ 623. *(g)* Of earnings.

§ 624. Of the title of purchasers as against mortgage lien, and of mortgagees as against vendor's lien.
§ 625. The mortgage lien not impaired by change of route.
§ 626. The mortgage lien not impaired by consolidation.
§ 627. Of mortgage trustees.
§ 628. Of the duties, liabilities and remuneration of mortgage trustees.
§ 629. Of supplying vacancies.
§ 630. Of the removal of mortgage trustees.

§ 602. Of the power of corporations in general to borrow and to mortgage.—A corporation has authority to borrow money,[1] to give its notes,[2] or to issue bonds therefor;[3] and, as incidental to this power, it may mortgage its property,[4] or give other security for the payment of its indebtedness.[5]

1 Kent v. Quicksilver Mining Co. 78 N. Y. 159; Curtis v. Leavitt, 15 N. Y. 9; Clark v. Titcomb, 42 Barb. 122; Commissioners of Craven v. Atlantic etc. R. R. Co. 77 N. C. 289; Burr v. McDonald, 3 Gratt. 215; Union Bank v. Jacobs, 6 Humph. 515; Savannah etc. R. R. Co. v. Lancaster, 62 Ala. 555; Oxford Iron Co. v. Spradley, 46 Ala. 98; Booth v. Robinson, 55 Md. 419; Lucas v. Whitney, 27 N. J. 221; Thompson v. Lambert, 44 Iowa, 239; Philadelphia etc. R. R. Co. v. Stichter (Sup. Ct. of Pa.), 21 Am. Law Reg. N. S. 713; Ward v. Johnson, 95 Ill. 215; *Bradley v. Ballard*, 55 Ill. 413; 7 Am. Rep. 656; In re International etc. Society, Law R. 19 Eq. 312; Australian etc. Co. v. Mounsey, 4 Kay & J. 733; Bank of Australia v. Breillat, 6 Moore C. P. 152, 193.

2 Taylor on Corporations, § 125.

3 Commissioners of Craven v. Atlantic etc. R. R. Co. 77 N. C. 289.

4 Commissioners of Craven v. Atlantic etc. R. R. Co. 77 N. C. 289.

5 Hope etc. Ins. Co. v. Perkins, 33 N. Y. 404; Nelson v. Eaton, 26 N. Y. 410; Uncas National Bank v. Rith, 23 Wis. 339.

§ 603. Of the power of railway companies to borrow and to mortgage.—It is generally held that railway corporations, being erected for the benefit and accommodation of the public, cannot without legislative authority, either absolutely or conditionally, by way of mortgage, alienate their franchises, or that property without which their franchises could have little more than a nominal existence.[1] A railway company may, however, assign a call made but

to arise from the sale of surplus lands as security for a valid pre-existing debt.[2] So also, an assignment of rolling stock under similar circumstances may be valid.[3] And property which a railway company has not acquired under the right of eminent domain, and which is not requisite to the performance of its duties to the public, may be alienated or mortgaged without legislative authority.[4] And there are cases holding that a company having authority to borrow money for the construction of its railway, has authority also to secure the debt by a mortgage of its property, unless forbidden by statute.[5]

1 Pullan v. Cincinnati etc. R. R. Co. 4 Biss. 35; Carpenter v. Black Hawk etc. Co. 65 N. Y. 43; Troy etc. R. R. Co. v. Kerr, 17 Barb. 581; Arthur v. Commercial etc. Bank, 11 Miss. 394; State v. Mexican etc. R. R. Co. 3 Rob. (La.) 513; *Richardson v. Sibley*, 11 Allen, 65, 67; 87 Am. Dec. 100; *Commonwealth v. Smith*, 10 Allen, 448; 87 Am. Dec. 672; Black v. Delaware etc. Canal, 22 N. J. Eq. 130; Stewart's Appeal, 56 Pa. St. 413; Randolph v. Wilmington etc. R. R. Co. 11 Phila. 502; Hays v. Ottawa etc. R. R. 61 Ill. 422; New Orleans etc. R. R. Co. v. Harris, 27 Miss. 517; Stewart v. Jones, 40 Mo. 140; Daniels v. Hart, 118 Mass. 543; Pierce v. Emery, 32 N. H. 484; Wood v. Bedford etc. R. R. Co. 8 Phila. 94; Atkinson v. Marietta etc. R. R. Co. 15 Ohio St. 21; Hart v. Eastern Union R'y Co. 7 Ex. 246. But see White Water etc. Canal Co. v. Vallette, 21 How. 414, where it was held that a mortgage might be validly made for the purposes of the regular business of the company: Kennebec etc. R. R. Co. v. Portland etc. R. R. Co. 50 Me. 9; Shepley v. Atlantic etc. R. R. Co. 55 Me. 395.

2 Pickering v. Ilfracombe R'y Co. Law R. 3 Com. P. 235; Gardner v. London etc. R'y Co. 2 Ch. 201. See, however, Landowners etc. Co. v. Ashford, 16 Ch. Div. 411, 437.

3 Blackmore v. Yates, Law R. 2 Ex. 225; Brown & Theobald's Railway Law, 85.

4 Farnsworth v. Minnesota etc. R. R. Co. 92 U. S. 49; Tucker v. Ferguson, 22 Wall. 527; Hendee v. Pickerton, 14 Allen, 381.

5 Savannah etc. R. R. Co. v. Lancaster, 62 Ala. 555; Kelly v. Alabama etc. R. R. Co. 58 Ala. 489; Commissioners v. Atlantic etc. R. R. Co. 77 N. C. 289.

§ 604. Statutes authorizing borrowing and mortgaging.—In New York, the General Railroad Act of 1850 authorizes companies formed thereunder "from time to time to borrow such sums of money as may be necessary for completing and finishing, or operating their railroad, and to issue

and dispose of their bonds for any amou
rowed, and to mortgage their corporate
and franchises to secure the payment of
contracted by the company for the purpo
said."[1] So in California, railway comp
authorized by statute to mortgage their p
And in England, the Companies' Clauses
dation Act of 1845 enacts that if the co
authorized by the special act of incorpo
borrow money on mortgage or bond, it
lawful for it, subject to the restrictions
in the special act of incorporation; to b
mortgage or bond such sums of money
from time to time, by an order of a gene
ing of the company, be authorized, to be b
not exceeding in the whole the sum pres
the special act of incorporation, and for
the repayment of the money so borrow
interest, to mortgage the undertaking
future calls on the stockholders, or to gi
in the manner thereinafter mentioned.[3] T
statute further provides, that if, after hav
rowed any part of the money so authori
borrowed on mortgage or bond, the com
off the same, it shall be lawful for it agai
row the amount so paid off, and so from
time; but that the power of reborrowing
be exercised without the authority of a
meeting of the company, unless the mon
reborrowed in order to pay off an existing
or bond.[4]

1 N. Y. Laws of 1850, ch. 140, § 10.

2 Cal. Acts of 1861, ch. 532, § 15, as amended by Cal. Acts
424, § 1; McLane v. Placerville etc. R. R. Co. 66 Cal. 606.

3 8 Vict. ch. 16, § 38. See, also, Hodges on Railways (7th

4 4 Vict. ch. 16, § 39.

§ 605. **Statutory restrictions—Exceptions in favor of current obligations—Lloyd's bonds.**—The power of a corporation to borrow is sometimes restricted by its charter or by the incorporating act, in which case it can borrow money only within the limits and in the manner so authorized.[1] In England it is provided by the standing orders of Parliament for the session of 1889, that no railway company shall be authorized to borrow a larger sum than one-third of its capital stock, or to borrow at all until half the capital be paid up.[2] If a company be prohibited from borrowing, it cannot issue bills of exchange.[3] So, also, an overdraft of a banking account is in effect a borrowing; therefore, if it has no power to borrow, it is equally *ultra vires* to overdraw the banking account.[4] But it would seem that a prohibition against borrowing on mortgage or bond before a certain amount of capital is paid, would not extend to borrowing without the security of mortgage or bond,[5] nor to incurring debts in the ordinary course of business. And notwithstanding restrictions upon its power to borrow, it may issue Lloyd's bonds in acknowlment of valid subsisting debts so incurred.[6] These bonds are acknowledgments under seal of debts due for a *bona-fide* consideration. They usually purport to be for work done or materials supplied for the purposes of the undertaking; and, when in fact issued for those purposes, there is no doubt of the right of their holders to sue upon them and to issue execution against the company.[7] So, also, a person who lends money to a company for the purpose of paying its debts, whether existing, or, it would seem, subsequently incurred, has a valid

claim against the company to the extent to which his loan has been so applied.[8] But the burden of showing that the loan has been applied in payment of debts lies upon the claimant.[9] The English statute known as the "Cheap Trains Act,"[10] after reciting that many railway companies have borrowed money, in a manner unauthorized by their acts of incorporation, upon the security of "loan notes" which have no legal validity, but which have been received in good faith and issued for the most part for the lawful purposes of the undertaking and in ignorance of their legal invalidity, declares it expedient to confirm such as have been already issued, but imposes a penalty for any further issue.[11]

1 Baroness Wenlock v. River Dee Co. 10 App. Cas. 354. See 7 & 8 Vict. ch. 18, § 19.

2 House of C. Stand. Ord. (for 1889) 153; House of L. Stand. Ord. (for 1889) 112; 1 Hodges on Railways (7th ed.), 13.

3 Bateman v. Mid Wales R'y Co. Law R. 1 Com. P. 499.

4 Blackburn etc. Soc. v. Cunliffe etc. Co. 22 Ch. Div. 61.

5 Nowell v. Andover etc. R'y Co. 3 Giff. 112.

6 Fontaine v. Cœrmarthen etc. R'y Co. 5 Eq. 316, 325; Browne & Theobald's Railway Law, 85.

7 White v. Cœrmarthen etc. R'y Co. 33 Law J. Ch. 93; S. C. 1 Hem & N. 786; *In re Bagnalstown etc. R'y Co.* I. R. 4 Eq. 505, where the cases are fully reviewed.

8 Blackburn etc. Soc. v. Cunliffe etc. Co. 22 Ch. Div. 61; 9 App. Cas. 857; Baroness Wenlock v. River Dee Co. 19 Q. B. Div. 155; In re Cork etc. R'y Co. 4 Ch. 748; In re German Mining Co. 4 De Gex, M. & G. 19; Corry v. Londonderry etc. Co. 29 Beav. 263; Troup's Case, 29 Beav. 353; Ulster R'y Co. v. Banbridge etc. R'y Co. Ir. Rep. 2 Eq. 190. See In re National Permanent Benefit Building Soc. Ex parte Williamson, 5 Ch. 309; Browne & Theobald's Railway Law, 85.

9 Blackburn etc. Soc. v. Cunliffe etc. Co. 22 Ch. Div. 61; 9 App. Cas. 857; Browne & Theobald's Railway Law, 85.

10 7 & 8 Vict. ch. 85.

11 7 & 8 Vict. ch. 85, § 19; 1 Hodges on Railways (7th ed.), 131, 132.

§ 606. Of the extent of the statutory authority.—A statute [illegible]

debts, enures to the benefit of prior as well as subsequent mortgagees.[1] The charter of a railroad company which authorizes the company to mortgage real estate, applies to any real estate which the company may acquire in any way.[2] The right to mortgage the whole corporate property includes the authority to mortgage a part thereof.[3] Charter or statutory authority to mortgage, carries with it the right to make the usual conditions;[4] but no power is thereby acquired to make extraordinary and unusual conditions.[5] Authority to mortgage for one purpose does not confer the power to mortgage for any other.[6] And in an action upon bonds authorized for a certain purpose, the plaintiff should allege that they were issued for that purpose,[7] and that, it is said, they were necessary for that purpose.[8] The necessity for the latter allegation, however, is doubted by an eminent authority.[9]

1 *Galveston etc. R. R. Co. v. Cowdrey*, 11 Wall. 459.
2 *Galveston etc. R. R. Co. v. Cowdrey*, 11 Wall. 459.
3 Pullan v. Cincinnati etc. R. R. Co. 4 Biss. 35.
4 Savannah etc. R. R. Co. v. Lancaster, 62 Ala. 555.
5 Pacific Rolling Mill Co. v. Dayton etc. R. R. Co. 5 Fed. Rep. 852; 5 Sawy. 61; Jessup v. City Bank etc. 14 Wis. 331; Hart v. Eastern Union R'y Co. 7 Ex. 246.
6 Grand Junction R. R. Co. v. Bickford, 23 Grant's Ch. (Ont.) 302.
7 Miller v. New York etc. R. R. Co. 18 How. Pr. 374.
8 Miller v. New York etc. R. R. Co. 18 How. Pr. 374.
9 Wood's Railway Law, 1626.

§ 607. Authority to guaranty the bonds of other corporations.—A railway company which has authority under its charter or by statute to raise money by the issue of its own bonds, has power to guaranty the bonds of municipal corporations lawfully issued in its aid,[1] or the bonds of another railroad company whose property it legally

leases,[2] or the bonds of another railroad which it receives in payment of a debt and which it sells for value or transfers i of its own debts, the guaranty being gi means of augmenting the value of the l enable it to obtain an adequate price

1 Railroad Co. v. Howard, 7 Wall. 392; Bonner v. City 2 Wood, 135.

2 Low v. California Pacific R. R. Co. 53 Cal. 53; Tayl tions, § 127.

3 Rogers Locomotive Works v. Southern R. R. Assoc. 3

§ 608. Authority to mortgage prope mortgage franchises, distinguished.— upon a corporation the power to m property, it is not requisite that the wo statute or of its charter should expressly it so to do.[1] Thus, authority to sell it is held to give by implication authority t its *property*.[2] But no implied power woul by conferred to mortgage its *franchise*.[3] weight of authority is adverse to any i of authority to mortgage the corporate even from an express power to mortgage erty of the company.[4] Such a power i lightly presumed. It is said, however, poration authorized by its charter to m "means, property and effects," may mo of its franchises other than that of being tion.[5] On the other hand, the power t the franchises of a corporation necessar the right to transfer both the franchis corporeal property requisite to their exer purchaser at the foreclosure sale.[6] A m franchises and property may create a

upon the latter, although illegal with respect to the former.[7]

1 East Boston etc. R. R. Co. v. Eastern R. R. Co. 13 Allen, 422.

2 McAllister v. Plant, 54 Miss. 106.

3 McAllister v. Plant, 54 Miss. 106.

4 Pullan v. Cincinnati etc. R. R. Co. 4 Biss. 35; Pollard v. Maddox, 28 Ala. 321; Dunham v. Isett, 25 Iowa. 284. But see *Pierce v. Milwaukee etc. R. R. Co.* 24 Wis. 551; 1 Am. Rep. 203; McAllister v. Plant, 54 Miss. 106.

5 *Meyer v. Johnston*, 53 Ala. 237. *Cf.* Louisville R. R. Co. v. Metcalf, 4 Met. (Ky.) 193.

6 New Orleans etc. R. R. Co. v. Delamore, 114 U. S. 501; *Galveston etc. R. R. Co. v. Cowdrey*, 11 Wall. 459; Phillips v. Winslow, 18 Mon. B. 431. *Cf.* Traer v. Clews, 115 U. S. 534.

7 Central etc. Mining Co. v. Platt, 3 Daly, 233.

§ 609. Of the authority of directors herein.— When authority has been conferred upon a corporation to borrow money and to pledge its personalty or mortgage its realty as security for the debt, the right to exercise this power vests in the directors of the company, unless expressly reserved to the shareholders;[1] and an executive committee of the directors, authorized by the board to procure a loan and possessing power according to the constitution of the corporation to transact "any official business," may execute a mortgage.[2] The charters of many corporations, however, and the general laws of some of the States, prohibit the directors to mortgage the corporate property without authority from the shareholders. Thus, in Massachusetts no mortgage of the real estate of a corporation can be legally made by the directors, unless authorized by a vote of the stockholders at a meeting called for that purpose.[3] So, also, in Texas, no mortgage of a railroad is valid, unless authorized by a vote of two-thirds of all the stock of the company.[4] And in England the power to authorize the borrowing of money upon bond or mortgage is vested in the

shareholders, in general meeting assembled.[5] This provision of the English act is held to be directory only, and does not invalidate securities issued without the authority of a general meeting, even in the hands of the original allottee, if he has no notice of any irregularity.[6] In this country it is held that the public has no interest in the compliance with these restrictions;[7] that they are for the benefit and protection of the shareholders alone; that they cannot be pleaded by the creditors of the company;[8] and that, when a mortgage has been executed by the directors, and the bonds have been issued, the company receiving the proceeds thereof, the shareholders will be estopped from pleading that the action of the directors was taken without authority from them.[9] But a court of equity, in a case where it would interpose at the suit of a shareholder to enjoin the president of the company from illegally delivering bonds in payment of the debts of other corporations which he controls, will step in subsequently to the delivery, and cancel the bonds in the hands of holders with notice, and release the trust deed securing them.[10]

1 Taylor v. Agricultural etc. Assoc. 68 Ala. 229; *Bugrill v. Nahant Bank*, 2 Met. 163; 35 Am. Dec. 395; Hendee v. Pinkerton, 14 Allen, 381; Tripp v. Swanzey Paper Co. 13 Pick. 291; Wood v. Whelen, 93 Ill. 153.

2 Taylor v. Agricultural etc. Assoc. 68 Ala. 229; Taylor on Corporations, § 225.

3 Mass. Pub. Stat. ch. 106, § 23. Held not applicable to foreign corporations in *Saltmarsh v. Spaulding*, 147 Mass. 224; 4 R'y & Corp. Law J. 151, 152

4 Tex. Rev. Stat. art. 4220.

5 8 Vict. ch. 16, § 38.

6 In re Romford Canal, 24 Ch. Div. 85; Landowners etc. Co. v. Ashford, 16 Ch. Div. 411; Fontaine v. Cœrmarthen R'y Co. 5 Eq. 316; Browne & Theobald's Railway Law, 85; Hodges on Railways, ...

9 Hadder v. Kentucky etc. R. R. Co. 7 Fed. Rep. 793; Texas etc. R'y Co. v. Gentry, 69 Tex. 625; McCurdy's Appeal, 65 Pa. St. 290.

10 City of Chicago v. Cameron, 120 Ill. 447.

§ 610. Legislative recognition of ultra vires mortgage.—The commonwealth alone being interested in restraining railway corporations from alienating that property, without which their duties to the public could not be performed,[1] it may by subsequent legislation cure the invalidity of a mortgage executed without authority.[2] And this may be done either by a statute expressly directed to that end, or indirectly by legislative recognition of the mortgage as an existing obligation.[3]

1 Hatcher v. Toledo etc. R. R. Co. 62 Ill. 477.

2 White Water etc. Canal Co. v. Vallette, 21 How. 414; Shaw v Norfolk County R. R. Co. 5 Gray, 162; Shepley v. Atlantic etc. R. R. Co. 55 Me. 395

3 Troy etc R. R. Co. v. Boston etc. R. R. Co. 86 N. Y. 107; Richards v. Merrimac etc. R. R. Co. 44 N. H. 127; Shepley v. Atlantic etc. R. R. Co. 55 Me. 395; Gardner v. London etc. R'y Co. Law R. 2 Ch. App. 201; Shrewsbury etc R'y Co. v. Northwestern R'y Co. 6 H. L. Cas. 113; East Anglian R'y Co. v Eastern Counties R'y Co. 11 Com. B. 775; Winch v. Birkenhead etc. R'y Co. 5 De Gex & S. 562; Bagshaw v. Eastern Union R'y Co. 7 Hare, 114; Northern R'y Co. v. Eastern Counties R'y Co. 21 Law J. Ch. 8.

§ 611. Of the remedies of shareholders and creditors with respect to an ultra vires mortgage or debt.—At the instance of a stockholder, equity will enjoin the execution of an *ultra vires* mortgage.[1] When a company mortgages its property without legal authority, any creditor standing in the same right with the mortgagee may file his bill in equity to compel an equal distribution of the mortgaged estate among all the creditors of that class.[2] Or the creditors may have recourse against the directors. For where a company borrows money *ultra vires*, the directors by whose authority it was done

are personally liable as upon a warranty of authority to borrow.[3] So, directors who accept a bill of exchange on behalf of a company are liable if the company has no power to accept bills.[4] Where the charter of a railroad company recited to what uses the money derived from a sale of bonds was to be put, and a trust agreement was entered upon in accordance with the terms of the charter, and the bonds were sold under a prospectus pointing out a source of inquiry as to the charter and trust, but misstating the purpose for which the money was to be used, the trustees were held not to be liable to the bondholders for using the money, in accordance with the trust agreement, instead of in the manner set out in the prospectus.[5]

1 *McCalmont v. Philadelphia etc. R. R. Co.* (N. Y. Sup. Ct. Special Term; no official report); 27 Int. Rev. Rec. 162; S. C. 3 Am. & Eng. R'y Cas. 163.

2 De Winton v. Brecon, 26 Beav. 533; S. C. 5 Jur. N. S. 882.

3 Firbank v. Humphreys, 18 Q. B. Div. 54; Chapleo v. Brunswick etc. Soc. 6 Q. B. Div. 696; Richardson v. Williamson, Law R. 6 Q. B. 276; Weeks v. Propert, Law R. 8 Com. B. 427. *Cf.* Rashdell v. Ford, 2 Eq. 750.

4 West London etc. Bank v. Kitson, 13 Q. B. Div. 360; Browne & Theobald's R'y Law, 86. As to the measure of damages for breach of warranty of authority, see In re National etc. Co. 24 Ch. Div. 367; Firbank v. Humphreys, 18 Q. B. Div. 54.

5 Banque Franco-Egyptienne v. Brown, 34 Fed. Rep. 162.

§ 612. Of the manner of executing mortgages. Mortgages of corporate property are to be executed by the directors of the company, or by an agent appointed by them, usually one of themselves, or the president of the corporation.[1] In England every mortgage and bond for securing money borrowed by a company must be by deed under the common seal of the company, duly stamped, and the consideration is required to be truly stated therein.[2] The mortgage deed should describe specifically and accurately the

bonds which it is given to secure.[3] The mortgage and the bonds may be validly executed out of the State in wh ch the railway is situated.[4] A mortgage by a corporation chartered in one State of its realty in another State, should be executed according to the laws of the latter. For the law of the place where real property is situated, exclusively governs as to the title of parties therein, the disposition and mode of tranfer thereof, and the solemnities attending the transfer.[5] But while the directors of a foreign corporation must, in giving a mortgage, comply with the law of the State wherein the land lies with respect to the forms of conveyance, yet the law of the State creating the corporation controls with respect to their authority to act. So that a statute in Massachusetts prohibiting directors from mortgaging the corporate property without authority from the stockholders, does not apply to a mortgage of property situated in Massachusetts, owned by a corporation deriving its charter from Vermont.[6]

1 *Galveston etc. R. R. Co. v. Cowdrey*, 11 Wall. 459; Ohio etc. R. R. Co. v. McPherson, 35 Mo. 13; 83 Am. Dec. 128; Arms v. Conant, 35 Vt. 744; McCurdy's Appeal, 65 Pa. St. 290; Wright v. Bundy, 11 Ind. 398.

2 8 Vict. ch. 16, § 41. Construing this section, see Landowners etc. Co. v. Ashford, 16 Ch. Div. 411; *In re Bagnalstown etc. R'y Co.* Ir. Rep. 4 Eq. 505.

3 Butler v. Rahm, 46 Md. 541.

4 Hervey v. Illinois Midland R'y Co. 28 Fed. Rep. 169; Hadder v. Kentucky etc. R. R. Co. 7 Fed. Rep. 793.

5 *Saltmarsh v. Spaulding* (1883), 147 Mass. 224; 4 R'y & Corp. Law J. 151, 152

6 *Saltmarsh v. Spaulding* (1883) 147 Mass. 224; 4 R'y & Corp. Law J. 151, 152.

§ 613. Of defective and informal mortgages.— A defective mortgage deed may be reformed by a court of equity so as to carry out the evident intent

of the parties. This has been done when it was clearly intended that the trustees under the deed should take a fee, but where no words of inheritance had been employed in the instrument.[1] And a defective mortgage which cannot operate as a deed has been held to be an equitable mortgage, taking precedence over a second mortgage duly executed, when the mortgagees under the latter were affected with notice.[2] A trust deed is in legal effect a mortgage.[3] Bonds issued by a corporation pledging its real and personal property for the payment of the debt and interest, and containing other corresponding stipulations, will be treated by a court of equi y as a mortgage and enforced according to the intention of the parties.[4] And a contract for the purchase of rolling-stock by the payment of an annual rental, with a condition of forfeiture upon non-payment, is held to be a mortgage.[5] But a sale of rolling-stock by a railway company, and a contemporaneous hire of the same stock at a rental which would repay the amount for which it was sold in five years, with a provision for a repurchase at the end of that time for a nominal price, has been held not to be a loan.[6] Under a refunding scheme, where no new bond can be given to one of the old bondholders for a portion of the company's indebtedness to him, because no bonds are issued for so small an amount, he is nevertheless entitled to a lien for the amount due him equal to the lien of other mortgage creditors.[7]

1 Coe v. New Jersey etc. R. R. Co. 31 N. J. Eq. 105; Randolph v. New Jersey etc. R. R. Co. 28 N. J. Eq. 49.

2 Miller v. Rutland etc. R. R. Co. 36 Vt. 452.

3 White Water etc. Canal Co. v. Vallette, 21 How. 414; McLane v.

4 Taylor on Corporations, § 675; White Water etc. Canal Co. v. Vallette, 21 How. 414; Ketchum v. Pacific R. R. Co. 4 Dill. 78, 86; Miller v. Rutland etc. R. R. Co. 36 Vt. 452.

5 Hervey v. Rhode Island etc. Works, 93 U. S. 664; Heryfo d v. Davis, 102 U. S. 235; S. C. Am. & Eng. R. R. Cas. 336; Frank v. Denver etc. R'y Co. 23 Fed. Rep. 123. See, also, *Fosdick v. Schall*, 99 U. S. 235, 251. *Infra*, § 614.

6 Yorkshire R'y Wagon Co. v. Maclure, 21 Ch. Div. 309. *Acc.* North Central Wagon Co v. Manchester etc. R'y Co. 35 Ch. Div. 191.

7 Blair v. St. Louis etc. R. R. 23 Fed. Rep. 524.

§ 614. The same subject, continued—Of bonds secured by statutory lien.—A formal mortgage is not necessary under a statute giving authority to issue bonds, and expressly making them a lien upon the property and franchises of the railway company. In such a case there need be no writing whatever in addition to the bonds.[1] But it is requisite to their operation as a lien, that the statute should be clear and explicit.[2] When this is the case, it is not even necessary that they should make mention of the statute under which they are issued.[3] A lien of this character covers all the property of the company, whether used in the construction and operation of the railway or not,[4] and whether belonging to it at the time or afterward acquired.[5] The lien may be waived by any bondholder so far as he himself is concerned,[6] but not so as to deprive a subsequent holder of the benefit thereof.[7] The holder of bonds made by statute a lien upon the property of a railway company, cannot avail himself thereof except by foreclosure proceedings instituted by the trustees in the manner provided by the statute.[8]

1 Wilson v. Boyce, 92 U. S. 320; Woodson v. Murdock, 22 Wall. 351; Murdock v. Woodson, 2 Dill. 529; State v. Florida etc. R. R. Co. 15 Fla. 690. *Cf.* White Water etc. Canal Co. v. Vallette, 21 How. 414.

2 Cincinnati v. Morgan, 3 Wall. 275; Brunswick etc. R. R. Co. v. Hughes, 52 Ga. 557; Collins v. Central Bank, 1 Kelly, 435.

3 Dundas v. Desjardins etc. R'y Co. 17 Grant (Up. Can.), 27.
4 Wilson v. Boyce, 92 U. S. 320.
5 Whitehead v. Vineyard, 50 Mo. 30.
6 Ketcham v. Pacific R. R. Co. 4 Dill. 74.
7 Wood's Railway Law, 1615.
8 Florida v. Anderson, 91 U. S. 667.

§ 615. **Mortgages to be recorded.**—Mortgages of railway property should be recorded in the same manner as mortgages upon the property of natural persons, in order to affect third parties with notice thereof. But an unrecorded mortgage is nevertheless valid as between the parties thereto, and has priority over the claims of other persons, extending credit to the corporation with actual knowledge thereof.[1] Thus, the claimants under a second mortgage expressly declared to be subject to a first mortgage, can derive no priority from the fact that the first instrument was never recorded.[2] A contract for the purchase of rolling-stock by the payment of an annual rental, with a condition of forfeiture upon non-payment, is deemed a mortgage, notwithstanding its being drawn in the form of a lease; but, if not recorded, it establishes no lien as against creditors proceeding by attachment and execution, or *bona-fide* purchasers from the company.[3] In Illinois, a contract whereby it is agreed to sell and deliver supplies, material and rolling-stock to a railway company, to be paid for in installments, the title to the property to remain in the vendor until the whole price be paid, is held to be in effect, so far as the chattel mortgage act of that State is concerned, the same as though a formal bill of sale had been executed and a mortgage given back to secure the price; and accordingly, if the

chattel mortgage act,[4] the vendor's lien has no validity as against third persons.[5] While as a contract it is legal and valid between the parties, the vendor incurs the risk of losing his lien if it work a legal wrong to third parties.[6] A mortgage covering both the road and the rolling-stock need not be recorded as a chattel mortgage also.[7] And railway mortgages are not subject to the provisions of chattel mortgage statutes requiring record to be made in the county in which the property is situated.[8] Where creditors of the railway company, having no actual notice of an unrecorded mortgage, have the right to levy upon the corporate property, they will not be postponed to the mortgage creditors by reason of the latter having instituted foreclosure proceedings.[9]

1 *Coe v. Columbus etc. R. R. Co.* 10 Ohio St. 372; 75 Am. Dec. 518.

2 *Coe v. Columbus etc. R. R. Co.* 10 Ohio St. 372; 75 Am. Dec. 518.

3 Frank v. Denver etc. R'y Co. 23 Fed. Rep. 123; Heryford v. Davis, 102 U. S. 235; S. C. 2 Am. & Eng. R. R. Cas. 386; Hervey v. Rhode Island etc. Works, 93 U. S. 664.

4 Ill. Rev. Stat. (1874,) 711, 712.

5 *Fosdick v. Schall*, 99 U. S. 235, 250; Hervey v. Rhode Island, 93 U. S. 664; Green v. Van Buskirk, 5 Wall. 307.

6 *Fosdick v. Schall*, 99 U. S. 235, 251; Murch v. Wright, 46 Ill. 488; 95 Am. Dec. 455.

7 Farmers' Loan & Trust Co. v. St. Joseph etc. R. R. Co. 3 Dill. 412. See, however, Williamson v. New Jersey Southern R. R. Co. 29 N. J. Eq. 311.

8 Metropolitan Trust Co. v. Pennsylvania etc. R. R. Co. 25 Fed. Rep. 760. See also, Hammock v. Farmers' Loan & Trust Co. 105 U. S. 77.

9 Coe v. New Jersey Midland R. R. Co. 31 N. J. Eq. 105.

§ 616. **What property is covered by a mortgage.**—The question as to what property is covered by a mortgage is entirely one of construction, dependent upon the authority under which the mortgage was made, and the intention of the parties as gathered from the langua[illegible]ised, the same rules

being applicable as control the construction of deeds made by individuals.[1] It is evident that, when the mortgaged property is specifically described, there can be but little room for controversy; for a description or enumeration of certain things, real or personal, as subject to the mortgage, is exclusive of all others.[2] But when such general terms as "all other property,"[3] "the undertaking,"[4] and "appurtenances,"[5] have been employed, there has been no little litigation over the intention of the parties. A mortgage of railway property is to be construed in connection with the statute by which its execution is authorized;[6] and when the statute confers upon the company the power to mortgage the whole, a deed couched in general terms will be deemed to create a lien upon all of the corporate property, unless a contrary intention appear in the instrument itself;[7] and, on the other hand, mere general words of description are not to be construed as extending the lien beyond the subject-matter as defined by the enabling act.[8] The franchise of being a corporation is not included in a mortgage of the property and franchise of a railroad, unless by positive provision of law.[9]

1 Wood's Railway Law, 1617; Wilson v. Gaines, 103 U. S. 417.
2 Smith v. McCullough, 104 U. S. 25; Brainerd v. Peck, 34 Vt. 496.
3 *Vide infra*, § 617; Alabama v. Montague, 117 U. S. 602.
4 *Vide infra*, § 617; Gardner v. London etc. R'y Co. Law R. 2 Ch. 201.
5 *Vide infra*, § 617; *Shamokin Valley R. R. Co. v. Livermore*, 47 Pa. St. 465; 86 Am. Dec. 552.
6 Wilson v. Gaines, 103 U. S. 417; Coe v. Midland etc. R. R. Co. 31 N. J. Eq. 105.
7 Coe v. Midland etc. R. R. Co. 31 N J. Eq. 105.
8 Wilson v. Gaines, 103 U. S. 417.
9 Memphis etc. R. R. Co. v. Berry, 112 U. S. 609; New Orleans etc. R. R Co. v. Delaware, 114 U. S. 296.

§ 617. (*a.*) **Of the effect of general words of description.**—A general mortgage creates a lien

only upon such property of the company as is *useful and necessary* for the operation of the railway. Accordingly, it does not cover property bought from a steamboat company for the purpose of destroying competition;[1] nor land purchased for shops and depots, but never used for those purposes;[2] nor a track laid only for a temporary use;[3] nor woodland.[4] The words "all other property" in a mortgage executed by a railroad company in favor of a State to secure it for a loan of its credit to the company, do not operate to include within the mortgage all the lands belonging to the company not specifically described.[5] A general mortgage of a railway and of all property "appertaining thereto" does not create a lien upon town lots owned by the company,[6] nor upon canal-boats used beyond the *termini* of the line.[8] A mortgage does not, of course, create a lien upon land grants which the railway has no authority to accept;[8] nor upon land granted conditionally, until the company has performed the condition.[9] The word "undertaking," more commonly found in the English mortgage deeds, is held to mean the *going concern* created by the act of incorporation;[10] and the mortgagees of the "undertaking" cannot break it up, nor, by bringing ejectment, deprive the company of that property by which the undertaking is carried on.[11] Accordingly, a mortgage of the "undertaking" does not cover the soil of the railway itself,[12] nor its surplus lands,[13] nor stock or property belonging to the company as common carriers,[14] nor future calls.[15] But a mortgage of the undertaking passes the rails, stations, works, and other buildings.[16]

1 Morgan v. Donivan, 58 Ala. 241.

2 Youngman v. Elmira e-c. R. R. Co. 65 Pa. St. 278.

3 Van Keuren v. Central R. R. Co. 38 N. J. 165.

4 Dinsmore v. Racine etc. R. R Co. 12 Wis. 649.

5 Alabama v. Montague, 117 U. S. 602. But see Wilson v. Boyce, 92 U. S. 320, where a statute declaring State-aid bonds to be a lien upon the road and property of the company, was held to extend the lien to all the lands whether used for a roadway or not. As to when the designation of land in a mortgage or lien is sufficient, see further, Alabama v Montague, 117 U. S. 610; St. Louis etc. R. R. Co. v. McGee, 115 U. S. 476.

6 Calhoun v. Memphis etc. R. R. Co. 2 Flip. 442. *Cf. Shamokin Valley R. R. Co. v. Livermore*, 47 Pa. St. 465; 86 Am. Dec. 552; Gardner v. London etc. R'y Co. Law R. 2 Ch. App. 201.

7 But "all other personal property whatsoever in any way" used by the company, covers canal-boats used beyond the *termini:* Parish v. Wheeler, 22 N. Y. 494.

8 *Meyer v. Johnston*, 53 Ala. 237.

9 Campbell v. Texas etc. R. R. Co. 2 Woods, 263.

10 Gardner v. London etc. R'y Co. Law R. 2 Ch. 201.

11 Myatt v. St. Helen's R'y Co. 2 Q. B. 364; S. C. 2 Eng. R'y Cas. 756; 1 Hodges on Railways, 124.

12 Myatt v. St. Helen's R'y Co. 2 Q. B. 364; S. C. 2 Eng. R'y & Canal Cas. 756. Wood's Railway Law, 1617.

13 Gardner v. London etc. R'y Co. 2 Ch. 201; King v. Marshall, 33 Beav. 565; Ex parte Stanley, 33 Law J. Ch. 535. See, too, Moor v. Anglo-Italian Bank, 10 Ch. Div. 681.

14 Hart v. Eastern Union R'y Co. 7 Ex. 246.

15 Gardner v. London etc. R'y Co. 2 Ch. 201; King v. Marshall, 33 Beav. 565; Ex parte Stanley, 33 Law J. Ch. 535. See, too, Moor v. Anglo-Italian Bank, 10 Ch. Div. 681.

16 Legg v. Mathieson, 2 Giff. 71. See W'ckham v. New Brunswick etc. R'y Co. Law R. 1 P. C. 64; Browne & Theobald's Railway Law, 86.

§ 618. (*b*). **Whether general words of description include future acquisitions.**—A mortgage in general terms covering all the property of the company, without express words of futurity, extending the lien to property subsequently acquired, will nevertheless embrace future acquisitions which are necessarily incidental to the railway,[1] and which, *at the time the mortgage was executed*, the company had authority to acquire.[2] Thus, lands taken under an existing statute, authorizing the construction of branch road, have been held to be covered by a mortgage containing no words of futurity.[3] But in

a similar case, where the statutory authority was granted after the mortgage had been made, the lien did not extend to the newly constructed branch; for it could not have been intended to mortgage that which at the time the company had no authority to acquire.[4]

1 Shaw v Bill, 95 U. S. 10; Pennock v. Coe, 23 How. 117; Pierce v. Emery, 37 N. H. 410; Ludlow v. Hurd, 1 Dim. 552; Dinsmore v. Racine etc. R. R. Co. 12 Wis. 649; Farmer's Loan & Trust Co. v. Commercial Bank, 15 Wis. 465; 82 Am. Dec. 689.

2 Seymour v. Canandaigua etc. R. R. Co. 25 Barb. 284. See, also, Shaw v. Bill, 95 U. S. 10.

3 Seymour v. Canandaigua etc. R. R. Co. 25 Barb. 284.

4 *Meyer v. Johnston*, 53 Ala. 237.

§ **619.** (*c*). **Of choses in action and calls.**—A mortgage of "all the property" does not embrace *choses in action* unless specifically mentioned.[1] In Pennsylvania, it is held that mortgages of the personal property of a railway, out of possession, are to be postponed to creditors who have obtained a lien by judicial process.[2] Words of futurity in a general mortgage do not create a lien upon unpaid subscriptions to the capital stock of the company.[3] In England, the Companies' Clauses Consolidation Act of 1845 declares that no mortgage, although comprising future calls, shall preclude the company from receiving and applying the calls to corporate purposes, "unless expressly so provided."[4] But it would seem that a mortgage of future calls may contain a power of sale notwithstanding this section.[5] The words "unless expressly so provided," appear to mean, provided by the mortgage deed, and not by the special act of incorporation.[6]

1 *Milwaukee etc. R. R. Co. v. Milwaukee etc. R. R. Co.* 20 Wis. 174; 22 Am. Rep. 702.

2 Wood's Railway Law, 1624, citir -- rchants' Bank v. Petersburg R. R. Co. 12 Phila. 482

3 Dean v Biggs, 25 Hun, 122.
4 8 Vict. ch. 16, § 42.
5 Pickering v. Ilfracombe R'y Co. Law R 3 Com. P. 235.
6 Browne & Theobald's Railway Law, 88.

§ 620. (*d*). **Of the effect of express words of futurity—Appurtenances.**—A railway company may, by express words of futurity, create a valid lien upon property subsequently acquired.[1] A mortgage in such terms will cover a lease of another road afterward taken,[2] the capital stock of another corporation thereafter purchased,[3] and a subsequently constructed extension of the railway.[4] A hotel built by a railway company to afford accommodations to its employees and passengers has been held appurtenant to the railway, and to be covered by a general mortgage containing words of futurity, although the company took its title thereto in the name of a trustee, for the express purpose of preventing the lien of the mortgage from attaching, and although the hotel was open to the general public as well as to passengers and employees.[5] When property, to be afterward acquired by a railroad company, is mortgaged, the lien attaches to it as soon as it is acquired and as effectually as if it had been described specifically.[6] It will not be presumed, however, that an after-acquired property clause was intended to cover property not properly appurtenant to the railway.[7] A tract of woodland seven miles from the railway has been held not appurtenant thereto;[8] and land designed for a canal basin has been considered, for the same reason, not within the terms of a general mortgage.[9] But lands acquired for the erection of car-houses were held to be appurtenant, although never used for that purpose,

the court saying that the case of a railway company holding more property than at present needed, is entirely different from those cases in which the company buys other property distinct from the road and its appurtenances, neither intended nor necessary for the present or prospective exercise of its franchises.[10] A general mortgage, although containing words of futurity, does not cover property which, at the time of the execution of the mortgage, he railroad had no authority to hold.[11] Property obtained by fraud is not covered by a mortgage of after-acquired property.[12]

1 Dunham v. Cincinnati etc. R. R. Co. 1 Wall. 254; Coney v. Pittsburgh etc. R. R. Co. 3 Phila. 173; Coopers v. Wolf, 15 Ohio St. 523; Ludlow v. Hurd, 1 Flsm. 552; In re General South American Co. 2 Ch Div. 337; In re Panama etc. Mail Co. 5 Ch. 318. See Willink v. Andrews, 16 I. R. C. L. 201. As to when the railroad mortgage attaches to subsequently acquired property, see further, *Galveston etc. R. R. Co. v. Cowdrey*, 11 Wall. 459; New Orleans etc. R. R. Co. v. Mellen, 12 Wall. 365; Scott v. Clinton etc. R. R. Co. 6 Biss. 535; Barnard v. Norwich etc. R. R. Co. 4 Cliff. 365; Dillon v. Barnard, 1 Holmes, 394.

2 Buck v. Seymore, 46 Conn. 156.

3 Williamson v. New Jersey etc. R. R. Co. 26 N. J. Eq. 398.

4 Texas etc. R'y Co. v. Gentry, 69 Tex. 625.

5 United States Trust Co v. Wabash etc. R'y Co. 32 Fed. Rep. 480. *Cf.* Mississippi Valley Co. v. Chicago etc. R. R. Co, 58 Miss. 896; 38 Am. Rep. 348, 350.

6 Parker v. New Orleans etc. R. R. Co. 33 Fed. Rep. 603.

7 Calhoun v. Memphis etc. R. R. Co. 2 Flip. 442; Seymour v. Canandaigua etc. R. R. Co. 25 Barb. 284; *Mississippi Valley Co. v. Chicago etc. R R. Co.* 58 Miss. 896; 38 Am. Rep. 348, 350, and cases there cited; Morgan v. Donovan, 58 Ala. 241; *Shamokin Valley R. R. Co. v. Livermore*, 47 Pa. St. 465; 85 Am. Dec. 552; Calhoun v. Paducah etc. R. R. Co 9 Cent. Law J. 63.

8 Dinsmore v. Racine etc. R. R. Co. 12 Wis. 640.

9 *Shamokin Valley etc. R. R. Co. v. Livermore*, 47 Pa. St. 465; 85 Am. Dec. 552.

10 Hamlin v. European etc. R'y Co. 72 Me. 83.

11 Randolph v. New Jersey etc. R. R. Co. 28 N. J. Eq. 49. See Coe v. New Jersey etc. R. R. Co. 31 N. J. Eq. 105.

12 Field v. Post, 38 N. J. Eq. 346; Williamson v. New Jersey etc. R. R. Co. 28 N. J. Eq. 277; 29 N. J. Eq. 311; Frazier v. Frederick, 28 N. J. Eq. 162.

§ 621. (*e*). **Of fixtures.**—Articles which have be-

nature, whether acquired before or after the execution of a general mortgage of the real estate of the company, are subject to the lien thereof.[1] There is much apparent conflict in the decisions with respect to what articles should be regarded as fixtures. The general rule is that the object, the effect and the mode of annexation must be all taken into consideration.[2] And these are questions for the jury, whose finding cannot be set aside unless clearly erroneous.[3] Whatever is the rule applicable to locomotives and cars and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after acquired property, it is well settled that bridges, and articles such as rails which become affixed to and a part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad.[4] Old rails are held to be fixtures and covered by a mortgage even after they have been taken up,[5] if proper management would require their being recast.[6] So also new rails not yet laid down are held to be fixtures.[7] Fuel is not held to come under the head of fixtures.[8] Machinery for making nails has been held to be a fixture and to pass with a workshop under a general mortgage;[9] but tools and implements attached to the realty are not considered as fixtures,[10] nor furniture in depots,[11] nor office furniture,[12] nor an iron safe.[13] Generally, whatever is placed in a building to carry out the purpose for which it was erected and permanently to increase its value for

occupation and use, although it may be removed without injury to itself or to the building, becomes a part of the realty as between mortgagor and mortgagee, and cannot be removed or otherwise disposed of while the mortgage is in force.[14]

1 Porter v. Pittsburg etc. Co. 120 U. S. 267, 283.

2 Southbridge Savings Bank v. Mason, 147 Mass. 500; Smith Paper Co. v. Servin, 130 Mass. 513; McConnell v. Blood, 123 Mass. 47; 25 Am. Rep. 12; M Laughlin v. Nash, 14 Allen, 136; 92 Am. Dec. 741.

3 *Southbridge Savings Bank v. Mason*, 147 Mass. 500; Montgomery v. Pickering, 115 Mass. 230; Reed v. Reed, 114 Mass. 372.

4 Porter v. Pittsburg etc. Co. 120 U. S. 267, 283, citing *Fosdick v. Schall*, 99 U. S. 235, 251; Dillon v. Bernard, 21 Wall. 430, 440; United States v. New Orleans R. R. Co. 12 Wall. 362, 365; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459, 480; 482; Dunham v. Railroad Co. 1 Wall. 254.

5 Salem Bank v. Anderson, 75 Va. 250.

6 Lehigh etc. Co. v. Central R. R. Co. 35 N. J. Eq. 379.

7 Wutjen v. St. Paul etc. R. R. Co. 40 Hun, 529; Palmer v. Forbes, 23 Ill. 301. But see Farmers' Loan & Trust Co. v. Commercial Bank, 15 Wis. 455; 82 Am. Dec. 689. *Cf. Farmers' Loan & Trust Co. v. Commercial Bank*, 15 Wis. 465; 82 Am. Dec. 689; Farmers' Loan & Trust Co. v. Cary, 13 Wis. 119; Dunsmore v. Racine etc. R. R. Co. 12 Wis. 649; also, Brainerd v. Peck, 31 Vt. 496.

8 Hunt v. Bullock, 23 Ill. 320. *Contra*, Coe v. McBrown, 22 Ind. 262.

9 Delaware etc. R. R. Co. v. Oxford etc. Co. 33 N. J. Eq. 452.

10 Lehigh etc. Co. v. Central R. R. Co. 35 N. J. Eq. 379; Williamson v. New Jersey etc. R. R. Co. 29 N. J. Eq. 311; S. C. 28 N. J. Eq. 277.

11 Lehigh etc. Co. v. Central R. R. Co. 35 N. J. Eq. 379.

12 Hunt v. Bullock, 23 Ill. 320. As to office furniture, see, also, Raymond v. Clark, 43 Conn. 129; Ludlow v. Hurd, 1 Disn. 552.

13 Titus v. Mabee, 25 Ill. 257.

14 *Southbridge Savings Bank v. Mason*, 147 Mass. 500. In the note to this case many of the decisions are collated; none of them, however, are in relation to railway property.

§ 622. (*f*). **Of rolling-stock.**—Rolling-stock is generally held to be so affixed to a railway as to pass under a general mortgage thereof;[1] and where this is the rule, it is not subject to levy and sale under the execution of a judgment obtained by unsecured creditors of the company.[2] But in New York, and several of the other American States, rolling-stock is held to be personal property;[3] and in Illinois, the State constitution ordains that the

rol'ing-stock of railways shall be deemed personal property.[4] This, however, is held not to change the rule that a general mortgage with words of futurity will cover rolling-stock acquired before the rights of unsecured creditors attached.[5] The lien of a mortgage having once attached to rolling-stock, continues, notwithstanding its removal on account of a change in the gauge of the railway.[6] By foreclosure of a mortgage on one division of a railroad, which is prior to any liens on other divisions, an interest in any right to use rolling-stock bought out of common funds of the company, placed and used upon the entire line for the common benefit, and of which no division has ever been made, will pass to the purchaser of that division.[7] A mortgage does not cover the rolling-stock of a third person, which has been placed upon the mortgaged railway under a contract with the company then operating it.[8]

1 Minnesota Co. v. St. Paul Co. 6 Wall. 142; Buck v. Memphis etc. R. R. Co. (Tenn.) 4 Cent. L. J. 430.

2 Gue v. Tidewater Co. 24 How. 257; *Phillips v. Winslow*, 18 Mon. B. 431; 68 Am. Dec. 729; Macon etc. R. R. Co. v. Parker, 9 Ga. 377; Youngman v. Elmira etc. R. R. Co. 65 Pa. St. 276; *Shamokin Valley R. R. Co. v. Livermore*, 47 Pa. St. 465; 85 Am. Dec. 532; Coney v. Pittsburgh R. R. Co. 8 Phila. 173.

3 *Hoyle v. Plattsburgh etc. R. R. Co.* 54 N. Y. 314; 13 Am. Rep. 595; *Randall v. Elwall*, 52 N. Y. 521; 11 Am. Rep. 747; Stevens v. Buffalo etc. R. R. Co. 31 Barb. 590; Williamson v. New Jersey Southern R. R. Co. 29 N. J. Eq. 311; reversing S. C. 28 N. J. Eq. 277; Boston etc R. R. Co. v. Gilmore, 37 N. H. 410; *Coe v. Columbus etc. R. R. Co.* 10 Ohio St. 372; 75 Am. Dec. 518.

4 Scott v. Clinton etc. R. R. Co. 6 Biss. 529.

5 Scott v. Clinton etc. R. R. Co. 6 Biss. 529.

6 Hamlin v. Jerrard, 72 Me. 62.

7 Milwaukee etc. R. R. Co. v. Milwaukee etc. R. R. Co. 6 Wall. 742. See, also, Milwaukee etc. R. R. Co. v. Soutter, 2 Wall. 609.

8 Hardesty v. Pyle, 15 Fed. Rep. 78. See, also, *Meyer v. Johnston*, 53 Ala. 237; Wood's Railway Law, 1624.

§ 623. (*g*). **Of earnings.**—The earnings of a rail-

expenses for labor, supplies and materials. Only the net earnings after deducting these operating expenses can be subjected to the lien of a mortgage. And if the gross earnings be diverted to the mortgagees, the current creditors thereby acquire a claim against the property secured by the mortgage.[1] A general mortgage, both of real and personal property, with words of futurity, is said to create a valid lien upon the net earnings of the company;[2] but the better rule would seem to be, that unless specifically mentioned, the net earnings do not come within the operation of such a mortgage;[3] and, at any rate, so long as they remain in the hands of the company, they are subject to attachment by the general corporate creditors.[4] When a railroad mortgage covers income, the mortgagor is not bound to account to the mortgagee for earnings while the property is in his possession until a demand is made therefor, or for a surrender of possession under the mortgage; but the commencement of a suit in equity to enforce a surrender of possession to the trustees under the mortgage, in accordance with its terms, is a demand for possession, and if the trustees are then entitled to possession, the company must account from that time.[5]

1 Calhoun v. St. Louis etc. R. R. Co. 11 Fed. Rep. 9; *Parkhurst v. Northern Central R. R. Co.* 19 Md. 472; 81 Am. Dec. 648. As to who are entitled to rents and profits under a railroad mortgage, see further: *Galveston etc. R. R. Co. v. Covdrey*, 11 Wall. 459; McCalester v. Maryland, 114 U. S. 605; *Fosdick v. Schall*, 99 U. S. 253; American Bridge Co. v. Heidelbach, 94 U. S. 800; Gilman v. Illinois etc. Tel. Co. 91 U. S. 617; Young v. Northern Illinois etc. Co. 9 Biss. 305; S. C. 13 Fed. Rep. 809; Hay v. Railroad Co. 4 Hughes, 374; Gilman v. Illinois etc. Tel. Co. 1 McCrary, 173; Don v. Memphis etc. R. R. Co. 20 Fed. Rep. 770.

2 Tompkins v. Little Rock etc. R. R. Co. 15 Fed. Rep. 6; Addison v. Lewis, 75 Va. 701; Kelly v. Alabama etc. R. R. Co. 58 Ala. 489.

3 Pullan v. Cincinnati etc. R. R. Co. 5 Biss. 237, 248; *Emerson v. European etc. R. R. Co.* 67 Me. 387; 24 Am. Rep. 39; De Graff v. Thompson, 24 Minn. 452.

4 Gilman v. Illinois etc. R. R. Co. 91 U. S. 603; *Galveston R. R. Co. v.*

States, an agreement was entered into by the consolidated company to protect the debts of the several corporations, it was held not to render bonds a lien which were not such before the consolidation, and that it was immaterial that the holders of such bonds might have had the power to enforce an exchange of them for bonds of the consolidated company, so long as they had neglected to do so.[3] In New York, the act authorizing the consolidation of railway companies provides that, "The rights of all creditors of, and all liens upon, the property of either of said corporations, parties to said agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of said corporations, *except mortgages*, shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it."[4] This exception with respect to mortgages is considered to restrict the lien of the mortgage to its lien upon the route of the company which gave it; and it is held that while the property acquired by consolidation would not be subject to the mortgage, yet that the bonds and coupons secured by it would be enforceable against the new company.[5] Where the consolidated company, being unable to pay the interest upon a mortgage of one of the original corporations, issued coupon bonds of its own therefor, it was held that this did not constitute a novation of the debt, but that these bonds also were secured by the mortgage.[6] The

non-existence of a *de facto* corporation, composed by the merger of one corporation with another, cannot be collaterally pleaded for the purpose of defeating the right to recover upon the bonds of one of the original companies.[7]

1 Hamlin v. Jerrard, 72 Me. 62.
2 Rutten v. Union Pacific R. R. Co. 17 Fed. Rep. 480.
3 Wabash etc. R'y Co. v. Ham, 114 U. S. 587.
4 N. Y. Laws of 1869, ch. 917, § 5.
5 Polhemus v. Fitchburg R. R. Co. 50 Hun, 397.
6 Gilbert v. Washington etc. R. R. Co, 33 Gratt. 586.
7 Chicago etc. R. R. Co. v. Putnam, 36 Kan. 121.

§ 627. **Of mortgage trustees.**—Railway mortgages are usually made to trustees for the benefit of the holders of the bonds which they are given to secure. It is becoming quite customary now for trust companies to assume these charges. The more responsible of these corporations being situated in New York city, the question has arisen under statutes declaring conveyances to non-residents to be invalid,[1] whether a foreign company may lawfully assume the trust? It has, however, been decided in the affirmative, notwithstanding the statute.[2] As a general rule, the bondholders themselves have no standing in court to enforce the terms of the mortgage, unless the trustees have refused or neglected to institute proceedings;[3] and a judgment in a suit against the mortgage trustees is binding upon the bondholders, unless they can show fraud or connivance on the part of their trustees.[4] Where, under a statute, the absolute title to the mortgaged property vests in the trustees upon foreclosure, they hold it in trust for the bondholders, and they cannot divest themselves of

the title in violation of their trust.[5] The bare fact that some of the trustees are holders of bonds, secured by their trust, is not sufficient of itself to make them incompetent to consent to a decree of foreclosure embodying a plan for reorganization.[6]

1 *E. g.* Ind. Rev. Stat. § 2988.

2 Farmers' Loan and Trust Co. v. Chicago etc. R'y Co. 27 Fed. Rep. 146. See, also, Hervey v. Illinois Midland R'y Co. 28 Fed. Rep. 169.

3 *Vide infra*, CHAPTER XXV—FORECLOSURE.

4 Campbell v. Railroad Co. 1 Wood, 368. *Acc.* Huntington v. Little Rock etc. R. R. Co. 3 McCrary, 581; S. C. 16 Fed. Rep. 906, where the bondholders had been heard from time to time in the suit.

5 Haven v. Grand Junction R. R. Co. 12 Allen, 337.

6 Shaw v. Little Rock etc. R. R. Co. 100 U. S. 605.

§ 628. Of the duties, liabilities, and remuneration of mortgage trustees.—Generally the trustees have no duties to perform until the conditions of the mortgage have been broken. But occasionally under the terms of the deed they are allowed to participate in the election of directors.[1] It is the duty of the trustees upon breach of the conditions of the mortgage, to enter and take possession of the railway or to institute proceedings of foreclosure.[2] But it is frequently provided that after default it shall be the duty of the trustees to take these steps "upon the written request of the holders of a majority of the bonds outstanding," in which case they have no authority to proceed until the request be made.[3] When upon default of payment the trustees have entered upon the property and are operating the railway, they become liable as common carriers. They may sue and be sued in the same manner as the railway company itself,[4] and are liable for torts committed in the operation of the road.[5] The trustees may subject

themselves to personal liability to the bondholders by failing to preserve the rights of their *cestui que trust*.[6] Trustees are entitled to remuneration for their services, the amount thereof being usually determined by the court, and payable out of the proceeds of the mortgaged property.[7] Persons claiming an interest in the property have a right to be heard, and to prosecute an appeal upon the question of allowance for remuneration.[8]

1 For an example, see New England etc. Ins. Co. v. Phillips, 141 Mass. 535.

2 Sturgis v. Knapp, 31 Vt. 1.

3 Chicago etc. R. R. Co. v. Fosdick, 106 U. S. 47; Union Trust Co. v. Missouri etc. R'y Co. 26 Fed. Rep. 435.

4 Daniels v. Hart, 118 Mass. 543; Stratton v. European etc. R'y Co. 76 Me. 239; Wilkinson v. Fleming, 30 Ill. 353; Palmer v. Forbes, 23 Ill. 301.

5 Stratton v. European etc. R'y Co. 76 Me. 269, where the injury was by fire caused by locomotive sparks.

6 Ricker v. Alsop, 27 Fed. Rep. 251.

7 Williams v. Morgan, 111 U. S. 634.

8 Williams v. Morgan, 111 U. S. 684.

§ 629. Of supplying vacancies.—When a mortgage trustee is incapacitated from acting, as by removal from the country,[1] or by death, the trust does not descend to his heirs.[2] Provisions for supplying vacancies are usually made by statute,[3] or by the mortgage deed itself.[4] A provision in the deed that vacancies shall be filled from among the bondholders, does not preclude the election of persons who have purchased bonds for the purpose of qualifying themselves, unless some fraudulent intent be shown.[5] If there be a provision in the deed that vacancies shall be filled immediately, the other trustees cannot enter or foreclose until the vacancies have been filled, and action already begun to enforce the mortgage is suspended until

successors be chosen. The action, however, does not abate upon the occurrence of a vacancy.[6]

1 Farmers' Loan & Trust Co. v. Hughes, 11 Hun, 130.

2 McAlister v. Plant, 54 Miss. 106.

3 Fletcher v. Rutland etc. R. R. Co. 39 Vt. 633; Wood's Railway Law, 1629.

4 Shaw v. Norfolk etc. R. R. Co. 5 Gray, 162; Richards v. Merrimack etc. R. R. Co. 44 N. H. 127.

5 Richards v. Merrimack etc. R. R. Co. 44 N. H. 127.

6 Shaw v. Norfolk etc. R. R. Co. 5 Gray, 162; Wood's Railway Law, 1630.

§ 630. Of the removal of mortgage trustees.— The trustees under a mortgage of railway property retain their trust until the debt has been paid, or until foreclosure proceedings have been terminated and they have been discharged by the court, unless for some reason they be incapacitated from acting.[1] But upon sufficient cause a court of equity may remove one or all of them and appoint their successors.[2] The court, however, will be slow to remove a trustee without very good evidence of sufficient grounds therefor.[3] But where a good cause for removal is presented to the court, it will not give weight to the fact that the directors of the mortgaged company have condoned his fault.[4] And proceedings to remove a trustee cannot be enjoined in a writ brought in another court.[5] If a trustee has become a non-resident, so that, in a suit seeking his removal, process cannot be served upon him, the court may enter its decree upon an *ex parte* hearing.[6]

1 Knapp v. Railroad Co. 20 Wall. 117.

2 Ketchum v. Mobile etc. R. R. Co. 2 Woods, 532.

3 Beadleston v. Knapp, 13 Abb. Pr. 335.

4 *North Carolina R. R. Co. v. Wilson*, 81 N. C. 223.

5 Farmers' Loan & Trust Co. v. McHenry, 9 Abb. N. Cas. 235.

6 Ketchum v. Mobile etc. R. R. Co. 2 Woods, 532.

CHAPTER XXIV.

BONDS AND COUPONS.

§ 631. Of income bonds.
§ 632. The same subject, continued—Net earnings.
§ 633. Convertible bonds.
§ 634. Of recitals and references in mortgages, bonds and coupons.
§ 635. Of fraud or irregularities in the issue of bonds—Want of consideration.
§ 636. Issue below par—Rights of purchaser at a discount.
§ 637. Registration.
§ 638. Of the negotiable nature of bonds and coupons—The American rule.
§ 639. The same subject, continued—The English statute and decisions.
§ 640. The requisite certainties of negotiability.
§ 641. The same subject, continued—Of the effect of absence of negotiable words in coupons.
§ 642. *Lis pendens.*
§ 643. Of lost or stolen bonds.
§ 644. Of the liability of an assignor of bonds and coupons.
§ 645. Equities arising from the negotiation of State-aid bonds by the railway.
§ 646. Of detached coupons.
§ 647. Of presentation and demand.
§ 648. Of the time of payment.
§ 649. Of days of grace.
§ 650. The effect of maturity upon the negotiable nature of bonds and coupons.
§ 651. Of interest upon overdue bonds and coupons.
§ 652. Distinction between purchase and payment of coupons.
§ 653. The same subject, continued—The intention of the parties.
§ 654. Of the statute of limitations as affecting coupons.

§ 631. Of income bonds.—The earnings of a railroad, being something to be acquired in future, are not covered by the terms of a general mort

gage containing no words of futurity.[1] Accordingly, it sometimes occurs that the income of the railroad is pledged to a different class of bondholders from those holding a mortgage upon the *corpus* of the property. There is no doubt of the power of the company to enter into such a contract, and to create a mortgage upon the income of the railroad which will subsist as a specific lien, into whosesoever hands the property may pass, receiver, purchaser, or consolidated company.[2] Where it is agreed by a railroad company that all its current net earnings and income, after deducting current expenses and needful expenditures for maintaining and operating its railroad and equipments, shall be applied and used for the payment of interest upon its bonds, this amounts in equity to a specific appropriation, and gives to the bondholders an equitable lien upon the income accruing during each semi-annual interest period.[3] Where a railway company agreed to issue scrip certificates for the deficit of interest on income bonds, when the net income for any six months should be insufficient to pay the full semi-annual interest, and contracted to redeem the scrip before declaring any dividend thereafter on the capital stock, it was held to be immaterial that a coupon-holder failed to surrender his coupons in exchange for the scrip, and that he had the same right to subsequent payment of the deficit as a scrip-holder.[4]

1 Pullan v. Cincinnati etc. R. R. Co. 5 Biss. 237, 248, and cases cited *supra*, § 623.

2 Rutten v. Union Pacific R'y Co. 17 Fed. Rep. 490; Pullan v. Cincinnati etc. R. R. Co. 5 Biss. 237, 248. *Cf.* Ketchum v. St. Louis, 101 U. S. 303; which, however, turned upon the interpretation of a statute of Missouri.

3 *Barry v. Missouri, Kansas & Texas R'y Co.* 27 Fed. Rep. 1, 7; S. C. 31 Fed. Rep. 323; S. C. 4 R'y & Corp. Law J. 193.

4 *Barry v. Missouri, Kansas & Texas R'y Co.* 27 Fed. Rep. 1; S. C. 34 Fed. Rep. 829; S. C. 4 R'y & Corp. Law J. 193.

§ 632. The same subject, continued.—Net earnings.—The holders of income bonds are in general bound by the determination of the directors of the company as to what constitutes net income.[1] An income mortgage does not preclude a railway company from expending its income upon such improvements and extensions as the developments which time and the competition of new roads or a demand for greater facilities would require.[2] But in determining the amount of net earnings for the payment of income bonds, a railway company is not entitled to deduct from its gross earnings a loss incurred in selling the income bonds at a discount, nor a floating debt contracted before the income mortgage was executed, nor the full amount of interest on a prior mortgage, the bondholders of which had agreed to accept a smaller percentage.[3] And the company cannot properly charge against the earnings sums required to be set apart annually for a sinking fund under the provisions of a first mortgage.[4] Where a company had misapplied its earnings as against an income mortgage, and a decree allowed the income bondholders to move for an injunction against further misapplication, and the company relied on a bare denial of a charge of misapplication, giving no figures from which the condition of its business or the manner of disposing of its earnings could be determined, and giving no explanation of the shrinkage of its semi-annual net earnings from one million and a half dollars to nothing, an injunction was allowed, although for a cause other than the particular one formerly

had in view, and although the charge was in part on information and belief.[5]

1 Day v. Ogdensburg etc. R. R. Co. 107 N. Y. 129.

2 Day v. Ogdensburg etc. R. R. Co. 107 N. Y. 129, 146.

3 *Barry v. Missouri, Kansas & Texas R'y Co.* 27 Fed. Rep. 1; S. C. 34 Fed. Rep. 829; S. C. 4 R'y & Corp. Law J. 198.

4 *Barry v. Missouri, Kansas & Texas R'y Co.* 27 Fed. Rep. 1, 6; S. C. 34 Fed. Rep. 829; S. C. 4 R'y & Corp. Law J. 196. But see Belfast etc. R. R. Co. v. Belfast, 77 Me. 445; where with respect to dividends upon preferred stock, net earnings were held to be the gross receipts after deducting the interest on the permanent debt, and the sums yearly devoted to a sinking fund for its payment, and all floating liabilities in good judgment actually due.

5 *Barry v. Missouri, Kansas & Texas R'y Co.* 36 Fed. Rep. 223; S. C. 27 Fed. Rep. 1; S. C. 4 R'y & Corp. Law J. 198.

§ 633 Convertible bonds.—A company having power to increase its capital stock may lawfully receive its own bonds in payment for its new shares.[1] It is not unusual for the bonds of corporations to contain a clause to the effect that upon their surrender to the treasurer of the corporation, the company will cause to be issued to the bearer a certain number of shares of its capital stock.[2] Bonds containing such a provision are called "convertible bonds." Statutes authorizing the issue of convertible bonds are held to confer authority upon the corporation to increase its capital stock beyond the amount fixed by its charter, if it be necessary so to do in order to issue shares of stock in exchange for bonds.[3] It is provided by the General Railroad Act of New York that the directors of the company may confer on any holder of any bond issue under that act, the right to convert the principal due or owing thereon into the stock of the company, at any time not less than two nor more than twelve years from the date of the bond, under such regulations as the directors may adopt. But it is provided that if the capital stock already authorized at

the time that the bonds are issued shall not be sufficient to meet the conversion when made, the stockholders shall before the issue authorize, in the manner prescribed in that act, an increase of capital stock to an extent sufficient to meet the deficiency.[4] The issue of bonds convertible into stock being precisely the same in effect as an issue of stock, the company cannot lawfully sell them at a discount.[5] The holder of convertible bonds may demand stock in exchange for them at any time before maturity.[6] And it has been said that even though the holder of the bonds demand a conversion into stock just before a dividend is declared, he is entitled to the stock and the dividend thereon.[7] But it seems more reasonable that a holder of convertible bonds who had received interest thereon up to the time that a dividend is about to be paid, cannot, upon then converting his bonds into stock, acquire a right to receive the dividend.[8] Where the time within which the conversion may be made is limited, the right to demand stock for the bonds must be exercised within that time, unless it has been extended.[9] No days of grace are allowable. Thus, where, by the terms of the statute allowing a street railway corporation to issue bonds, it was provided that the holders of the bonds "may convert them into stock as the bonds mature, unless redeemed by the company before maturity," it was held that a bondholder who presented his bonds on the second day after the maturing of the bonds, and demanded stock in exchange, was too late.[10] The right to demand the conversion of the bond into stock runs with the bond, and when the bond

is transferred no right of action for its non-conversion remains in the former owner.[11]

1 Lohman v. New York etc. R. R. Co. 2 Sand. (Super. Ct.) 39; Reed v. Hayt, 51 N. Y. Super. Ct. 121.

2 *E. g.* Chaffee v. Middlesex R. R. Co, 146 Mass. 224.

3 Belmont v. Erie R'y Co. 52 Barb. 637, 669; Ramsey v. Erie R'y Co. 33 How. Pr. 193, 216; Cook on Stock & Stockh. § 283. *Cf.* Ramsey v. Gould, 57 Barb. 398; S. C. 8 Abb. Pr. N. S. 17.; *Pratt v. American Bell Telephone Co.* 141 Mass. 225; S. C. 12 Am. & Eng. Corp. Cas. 110; 55 Am. Rep. 465. *Contra*, Manufacturers' etc. Ins. Co. v. Middlesex R. R. Co. 146 Mass. 224.

4 N. Y. Laws of 1850, ch. 140, § 10, as amended by N. Y. Laws of 1880, ch. 133.

5 Cook on Stock & Stockh. § 233. *Cf.* Van Allen v. Illinois Central R. R. Co. 7 Bosw. 515.

6 Jones v. Terre Haute etc. R. R. Co. 57 N. Y. 196.

7 Jones v. Terre Haute etc. R. R. Co. 57 N. Y. 196.

8 Sutliff v. Cleveland etc. R. R. Co. 24 Ohio St. 147.

9 Muhlenburg v. Philadelphia etc. R. R. Co. 47 Pa. St. 16.

10 Chaffee v. Midd esex R'y Co. 146 Mass. 224.

11 Denny v. Cleveland etc. R. R. Co. 23 Ohio St. 108, 114.

§ 634. Of recitals and references in mortgages, bonds, and coupons.—References in bonds to the mortgage by which they are secured,[1] and references in coupons to the bonds from which they have been detached, put the purchaser upon inquiry, and charge him with notice of the terms of the instrument referred to.[2] For example, references in coupons to the bonds, and in bonds to the mortgage, charge the holders both of the coupons and the bonds with notice of a provision in the mortgage with respect to waiver of defaults in payment of the moneys thereby secured, by the written consent of a majority of the bondholders; and by a provision of this nature subjecting the time of payment to a contingency over which the holder has no control, and which may postpone payment indefinitely, the negotiability of the paper is destroyed.[3] For, although a coupon be detached from its bond,

it still remains a part thereof in contemplation of law, and is protected by and subject to the covenants in the bond.[4] Where a bond merely refers to the mortgage by which it is secured, the recitals in the mortgage will control with respect to the bond.[5] But where the bond itself sets forth the terms of the contract, and there is a variance between it and the mortgage deed, the bond will control.[6]

1 *McClelland v. Norfolk Southern R. R. Co.* 110 N. Y. 469; 4 R'y & Corp. Law J. 545, 546.

2 McClure v Township of Oxford, 94 U. S. 429; *McClelland v. Norfolk Southern R. R. Co.* 110 N. Y. 469, 476; 4 R'y & Corp. Law J. 545, 547; Silliman v. Fredericksburg etc. R. R. Co. 27 Gratt. 119

3 *McClelland v Norfolk Southern R. R. Co.* 110 N. Y. 469; 4 R'y & Corp. Law J 545, 546, 547.

4 City of Lexington v. Butler, 14 Wall. 483; City of Kenosha v. Lawson, 9 Wall. 483; State v. Spartanburgh etc. R. R. Co. 8 S. C. 129, 153.

5 Caylus v. New York etc. R. R. Co. 10 Hun, 295.

6 Indiana etc. R.R. Co. v Sprague, 103 U. S. 756. *Cf.* Morgan v. United States, 113 U. S. 502; Rouede v. Jersey City, 18 Fed. Rep. 720.

§ 635. Of fraud or irregularities in the issue of bonds.—Want of consideration.—A company duly organized according to law and in possession of a railway, wholly or partly constructed, is presumptively the owner thereof, and nothing appearing as of record to the contrary, a purchaser of its bonds may assume that it had the legal right to mortgage the property and to issue bonds thereon.[1] Where bonds have been properly executed, it is immaterial that the coupons were signed by only one of the officers that signed the bonds.[2] A printed *fac-simile* of the autograph signatures upon the bond, will be a sufficient signing of the coupons.[3] The issue of bonds imports compliance with all the required prerequisites, and a *bona-fide* purchaser is under no obligation to inquire whether those prerequisites

have been complied with.[4] And recitals in the bonds are conclusive evidence in favor of a purchaser of the coupons who has no notice that the conditions precedent to the issue have not been fulfilled.[5] Although the bonds may have been wrongfully put into circulation, a purchaser in good faith, ignorant of the circumstances, may enforce their payment.[6] It has been held, however, that if bonds be issued by the officers of a company to a party under a contract which amounted to a fraud upon the shareholders, a *bona-fide* purchaser takes them subject to equities.[7] But it is not permissible for the company to show that the issue was made in violation of restrictions imposed by its charter.[8] It would seem, however, that purchasers of bonds issued under an unconstitutional statute are chargeable with a knowledge of their illegal origin.[9] But if the law under which bonds were issued had been recognized as valid by the highest court of the State at the time of the purchase, no subsequent decision can affect their validity in the hands of *bona-fide* purchasers for value.[10] In a case in which the bonds of a railway company which had not been issued, were seized by soldiers in the war between the American States, and, together with overdue coupons attached, were negotiated at a price so small as would have naturally excited suspicion, the purchasers could not sustain the position of *bona-fide* holders without notice.[11]

1 Blair v. St. Louis etc. R. R. Co. 27 Fed. Rep 176.

2 Thayer v. Montgomery County, 3 Dill. 389.

3 Lynde v. County, 16 Wall, 6; McKee v. Vernon County, 3 Dill. 210; Pennington v. Bæhr, 43 Cal. 555; Dillon on Municipal Bonds, 12, note.

4 Pearce v. Madison R. R. Co. 21 How. 441.

5 Marshall v. Elgin, 3 McCrary, 35; S. C. 8 Fed. Rep. 783.

6 Grand Rapids etc. R. R. Co. v. Sanders, 17 Hun, 552; Webb v. Herne Bay Commissioners, Law R. 5 Q. B. 642.

7 Athenæum etc. Ins. Co. v. Pooley, 3 DeGex & J. 294; S. C 5 Jur. N. S. 120. But see *In re Imperial Land Co.* 19 Week. R. 223; S. C. Law R. 6 Ch. App. 96.

8 Ellsworth v. St. Louis etc. R. R. Co. 98 N. Y. 553; S. C. 33 Hun, 7.

9 Duke v. Brown (1887), 96 N. C. 127.

10 Marshall v. Elgin, 3 McCrary, 35; S. C. 8 Fed. Rep. 783, 787, 798; the City v. Lamson, 9 Wall, 477; Douglass v. Pike County, 101 U. S. 687.

11 Parsons v. Jackson, 99 U. S. 434. See, also, Indiana etc. R. R. Co. v. Sprague. 103 U. S. 756. *Cf.* Jackson v. Ludeling, 99 U. S. 513; Rouede v. Jersey City, 18 Fed. Rep. 722.

§ 636. Issue below par—Rights of purchaser at a discount.—While an issue of corporate bonds below par is an abuse of power on the part of the corporate officers for which they are probably individually liable to the extent of the loss thereby incurred, that act would not render the bonds void, although it may no doubt be relied upon against the original holder as usury.[1] A *bona-fide* holder of bonds may collect their full face value from the railway company, although he bought them for less than par,[2] and although the bonds may have been issued wrongfully in the first place.[3] Where plaintiff's intestate conveyed a railway to defendant, and agreed to accept, as part of the purchase-money, bonds secured by mortgage on the line, plaintiff is entitled, the bonds never having been given, to recover their full par value, although they are below par in the market.[4] On a judgment for the subscription against a subscriber to railroad bonds which the company pledged and became unable to deliver, defendant is entitled to have credited the value of the bonds at the time of their hypothecation, and not merely their proportional value as measured by the mortgage security, when, after foreclosure of the mort-

gage, the bondholders sell out to another road at a loss.[5]

1 Sherlock v. Winetka, 68 Ill. 530, 539. *Cf.* Railroad Co. v. Bank of Ashland, 12 Wall. 226. See In re Compagnie Generale de Bellegarde, 4 Ch. Div. 470; In re Anglo-Danubian etc. Co. 20 Eq. 339, where it has been held under the English Companies' Clauses Acts that debentures may be issued at a discount. Also, In re Regent's Canal etc. Co. 3 Ch. Div. 43, where it is held that debentures authorized to be issued may be deposited as security for a loan and will rank *pari passu* with the other debentures.

2 *Cromwell v. County of Sac*, 96 U. S. 51, 59, 60; Grand Rapids etc. R. R. Co. v. Sanders, 17 Hun. 552.

3 Grand Rapids etc. R. R. Co. v. Sanders, 17 Hun. 552.

4 Texas etc. R'y Co. v. Gentry, 69 Texas, 625.

5 Galena etc. R. R. Co. v. Ennor (1838), 123 Ill. 505.

§ **637. Registration.**—In England, the secretary of the company is required by statute to keep a registry of mortgages and bonds, wherein is recorded the number and date of the mortgage or bond, the sums secured thereby, and the names of the parties thereto, and this registry is open to the free inspection of shareholders and mortgagees or bondholders, or any person interested in the bonds or mortgage.[1] Persons entitled to inspect the register under the section would appear to be entitled to inspection by their solicitor.[2] Transfers or mortgages or bonds are required to be registered in like manner. And no party having made a transfer shall have power to make void or release or discharge the mortgage or bond so transferred, or any money thereby secured; and until the entry be made, the company shall not be in any manner responsible to the transferree in respect of the mortgage.[3] In Georgia, there is a statute subjecting to a certain penalty any person placing the bonds of a corporation in circulation without first making due return thereof to the secretary of State.[4]

1 8 Vict. ch. 16, § 45; 1 Hodges on Railways (7th ed.), 122.

2 In re Credit Co. 11 Ch. Div. 256; Browne & Theobald's Railway Law, 89.

3 8 Vict. ch. 16, § 47.

4 Ga. Act of Feb. 28, 1876, § 4. Upon the manner of enforcing this statute, see McDaniel v. Gate City Gas Light Co. 79 Ga. 53.

§ 638. Of the negotiable nature of bonds and coupons—The American rule.—Although it has been said that mortgage bonds and coupons, payable to bearer or to a designated person, "or his assigns," are not by the law merchant, strictly speaking, negotiable instruments,[1] yet it is well settled that they do pass by delivery under assignment in blank, and are not subject as specialties to any equities between the prior holders or between them and the obligor corporation,[2] notwithstanding the fact that they may be under seal.[3] The purchaser of bonds and coupons is not a mere assignee of causes of action of which they are evidence, but he takes full title upon delivery; and the promise of the payor to pay the bearer, is a promise to pay him, the purchaser,[4] which may be enforced by suit in his own name.[5] Since, then the usage and practice of railway companies and of the capitalists and business men of the country, and the decisions of the courts, do at the present day, treat this class of securities as similar in nature to bills and notes,[6] it would appear to be a profitless undertaking to inquire whether in the strictest sense of the word they should be termed negotiable instruments? The negotiable character of railway mortgage bonds, or other corporate bonds, is indirectly recognized in New York by a statute authorizing the owners or holders (when registry is not by law provided) to render them "non-negotiable" by indorsing and subscribing

upon them a statement that they are the property of such owner.[7] Coupons are promissory notes within the meaning of the United States statutes concerning national banks; but it is doubtful whether bonds could be so regarded.[8] Coupons differ from bills of exchange in not being intended for acceptance when drawn on a bank.[9] It is held in Illinois, that where the *bona-fide* assignee of commercial paper secured by mortgage seeks relief in equity by the foreclosure of the mortgage, the mortgagor may successfully interpose any defense which would have been available against the original payee or holder of the paper.[10]

1 McCoy v. Washington County, 3 Wall. Jr. 381; Clarke v. Janesville, 1 Biss. 98; *Morris Canal etc. Co. v. Fisher*, 1 Stockt. Ch. 667; 64 Am. Dec. 428, and note, p. 430.

2 *McClelland v. Norfolk Southern R. R. Co.* 110 N. Y. 469, 475; S. C. 4 R'y & Corp. Law J. 545; *Everston v. National Bank*, 66 N. Y. 14; 23 Am. Rep. 9, and note on pages 13-17, where many cases are cited; Brainerd v. New York etc. R. R. Co. 25 N. Y. 496; *Morris Canal etc. Co. v. Fisher*, 1 Stockt. Ch. 637; 64 Am. Dec. 428, and note on p. 430 *et seq.*, where an exhaustive line of cases is cited. *Acc.* Commissioners v. Aspinwall, 21 How. 539; Thompson v. Lee County, 3 Wall. 327; Rorer on Railroads, 250; and cases cited *infra*.

3 Clark v. Iowa City, 20 Wall. 583; Gelpcke v. Dubuque, 1 Wall. 175; *Dinsmore v. Duncan*, 57 N. Y. 573; 15 Am. Rep. 534; Langton v. South Carolina R. R. Co. 2 S. C. 248; Craig v. Vicksburg, 31 Miss. 216; Virginia v. Chesapeake etc. Canal Co. 32 Md. 501; Chapin v. Vermont etc. R. R. Co. 8 Gray, 575; Jackson v. York etc. R. R. Co. 48 Me. 147; *Morris Canal etc. Co. v. Fisher*, 9 N. J. Eq. 667; 64 Am. Dec. 423, annotated; Carr v. Le Fevre, 27 Pa. St. 413.

4 City of Lexington v. Butler, 12 Wall. 282, 233; Cooper v. Town of Thompson, 12 Blatchf. 434, 437.

5 Ottawa v. Portsmouth National Bank, 103 U. S. 342. *Cf.* Dean v. Hall, 17 Wend. 214; Brush v. Reeves, 3 Johns. 439; 3 Kent's Commentaries, 73.

6 Ottawa v. Portsmouth National Bank, 105 U. S. 342; Roberts v. Bolles, 101 U. S. 119; Humboldt v. Long, 92 U. S. 642; Lexington v. Butler, 14 Wall. 282; Mercer County v. Hacket, 1 Wall. 83; Gelpcke v. Dubuque, 1 Wall. 175; Eagle v. Kohn, 84 Ill. 292; Kenosha v. Lamson, 9 Wall. 477; Chicago etc. R. R. Co. v. Howard, 7 Wall. 392; 3 Rogers v. Burlington, 3 Wall. 654; Murray v. Lardner, 2 Wall. 110; Hall v. Muscatine, 1 Wall. 372; Van Hostrup v. Madison City, 1 Wall. 291; Moran v. Miami County, 2 Black, 722; Woods v. Lawrence County, 1 Black, 386; Zabriskie v. Cleveland etc. R. R. Co. 23 How. 381; [illegible] et etc. R. R. Co. 21 How. 583, where the authorities are extensively [illegible] ...ueck; McClelland v. Norfolk Southern R. R. Co. 110 N. Y. 43[illegible] R'y & Corp. Law J. 545; Everston v. National Bank, 66 N. Y. 14; [illegible] p. 9, annotated; Brook-

man v. Metcalf, 32 N. Y. 591; *Mechanics' Bank v. New York etc. R'y Co.* 13 N. Y. 599; Connecticut etc. Co. v. Cleveland etc. R. R. Co. 41 Barb. 9; Brainard v. New York etc. R. R. Co. 25 N. Y. 496; Blake v. Livingston County, 61 Barb. 149; Arents v. Commonwealth, 1 Gratt. 750; Langton v. South Carolina R. R. Co. 2 S. C. (N. S.) 248; Craig v. Vicksburg, 31 Miss. 216; Maddox v. Graham, 2 Met. (Ky.) 56; *Spooner v. Holmes*, 102 Mass. 5, 3 Am. Rep. 491; Chamin v. Vermont etc. R. R. Co. 8 Gray, 575; Myers v. York etc. R. R. Co. 43 Me. 232; *National etc. Bank v. Hartford etc. R. R. Co.* 8 R. I. 375, 379; 5 Am. Rep. 582; Beaver County v. Armstrong, 44 Pa. 63; *Diamond v. Lawrence Co.* 37 Pa. 353; 78 Am. Dec. 429; Junction R. R. Co. v. Cleneay, 13 Ind. 161; Johnson v. Stark County, 24 Ill. 92; Clark v. Janesville, 10 Wis. 140; *Morris Canal etc. Co. v. Fisher*, 1 Stockt. 657; 64 Am. Dec. 423, annotated; Commonwealth v. Perkins, 43 Pa. St. 400; Carr v. Le Fevre, 27 Pa. St. 413; Eaton etc. R. R. Co. v. Hunt, 20 Ind. 457; Griffith v. Burdsal, 35 Iowa, 138; 2 Schouler on Personal Property (2nd ed.), 569; Parsons on Contracts, 247; Rorer on Railroads, 230; Article on Coupons, by C. W. Haasler, Esq., in 4 Cent. Law J. 315.

7 N. Y. Laws of 1871, ch. 84, § 1.

8 Thompson v. Lee County, 3 Wall. 327; First National Bank v. Bennington, 17 Blatchf. 53, 56. See note to Morris Canal etc. Co. v. Fisher, 64 Am. Dec. 428, 431.

9 Jones on Railroad Securities, § 317; Daniel on Negotiable Instruments, § 1493.

10 Chicago etc. R. R. Co. v. Loewenthal, 93 Ill. 433, 450, 451.

§ 639. **The same subject, continued.—The English statute and decisions.**—In England it is enacted that any person entitled to any mortgage or bond may from time to time transfer his right and interest therein to any other person; and every such transfer shall be by deed duly stamped, wherein the consideration shall be duly stated.[1] The same act declares that the interest on any such mortgage or bond shall not be transferable, except by deed duly stamped.[2] This statute makes mortgages and bonds assignable at law, and the transferree is the proper person to sue.[3] The equitable transferree's rights are, however, limited to sums actually advanced or paid.[4] But in that country it is held that the mere fact that a security is payable to a designated person, "his executors, administrators or transferrees, or to the holder for the time being,"

to be entirely settled in England whether a bond payable to bearer, without more, imports a contract by the company not to set up equities.[6] The company may, however, lose the right to set up against an assignee any legal or equitable claims it may have against the assignor, by a contract in the instrument itself,[7] or by a contract outside of the instrument;[8] or it may be estopped by a previous course of conduct,[9] or by recognizing the assignee as the owner, and issuing to him a certificate that he is the registered proprietor, and dealing with him as the owner;[10] or by submitting to judgment on the bonds.[11] Where there has been no legal transfer, the company cannot set up against the equitable transferree any claims it may have against the legal holder.[12] A different question arises as between assignor and assignee. If the instrument is not negotiable at law, an assignee for value without notice gets no better title than his assignor, whether the instrument is expressed to be payable to bearer or not.[13] Here, however, the doctrine of estoppel may come in. For instance, a person who deposits with an agent an instrument purporting to be payable to bearer, cannot set up the fraud of the agent against a purchaser for value without notice, on the ground that he has adopted the representation contained in the instrument.[14]

1 8 Vict. ch. 16, § 46.

2 8 Vict. ch. 16, § 49.

3 Vertue v. East Anglian R'y Co. 5 Ex. 230.

4 In re Romford Canal Co. 24 Ch. Div. 85.

5 In re Natal etc. Co. 3 Ch. 355.

6 See In re Blakely etc. Co. 3 Ch. 154; Goodwin v. Robarts, 1 App. Cas. 476; In re General Estates Co. 3 Ch. 758; Imperial Land Co. 11 Eq. 478. In the two last cases the instrument was held to be a promissory note. In re Blakely Ordnance Co. Law R. 3 [illegible] App. 154, where, although debentures under [illegible]

able, it is admitted that they possess one of the most important characteristics of negotiable paper, in not being subject in the hands of a *bona fide* assignee to equities between the company and the primary payee; citing, In re Agra etc. Bank, Law R. 2 Ch. App. 391. But see In re Natal Investment Co. Law R. 3 Ch. App. 355, where it was held, that to exclude those equities, it must be made to appear very clearly that the original parties so intended. *Cf.* Aberman Iron Works v. Wickens, Law R. 5 Eq. Cas. 485, 517.

7 Browne & Theobald's Railway Law, 89.

8 In re Blakely etc. Co. 3 Ch. 154.

9 Dickson v. Swansea Vale R'y Co. Law R. 4 Q. B. 44; Graham v. Johnson, 8 Lq. 37.

10 Higgs v. Assam etc. Law R. 4 Ex. 387; In re Northern Assam etc. Co. 19 Eq. 450; In re Hercules Ins. Co. 19 Eq. 302.

11 In re South Essex Co. 11 Eq. 157.

12 In re Romford Canal Co. 24 Ch. Div. 85; Browne & Theobald's Railway Law, 89.

13 Browne & Theobald's Railway Law, 90; Crouch v. Credit Foncier, Law R. 8 Q. B. 374.

14 Easton v. London etc. Bank, 34 Ch. Div. 95; Goodwin v. Roberts, 1 App. Cas. 476; Williams v. Colonial Bank, Weekly Notes (1887), 151; Browne & Theobald's Railway Law, 90.

§ 640. The requisite certainties of negotiability. When bonds or coupons contain especial stipulations, and their payment is subject to contingencies not within the control of their holders, they are, by established rules, deprived of the character of negotiable instruments, and become exposed to any defense existing thereto, as between the original parties to the instrument.[1] It is essential to their negotiable nature that bonds and coupons contain an unconditional promise to pay a certain amount to a designated person, or order, or to bearer, at a certain place and at a time capable of exact ascertainment.[2] Uncertainty in regard to any one of these particulars destroys the negotiability of the instrument,[3] and they become mere *choses in action*, subject, even in the hands of *bona-fide* purchasers, to any equities between prior holders or between them and the corporation.[4] Thus, if coupons be subject to the condition that the ti of their pay-

ment should be changed, altered and postponed, from time to time, at the option of a majority of the holders of a series of bonds simultaneously issued therewith, it would deprive them of one of the essential characteristics of negotiable paper.[5] So, also, where bonds contained an acknowledgment of indebtedness to a certain person or bearer, in a certain amount in English pounds in London, or a corresponding amount in American dollars in New York or New Orleans, the place of payment to be fixed by the indorsement of the president of the company, but in his indorsement the place was left blank, they were held non-negotiable.[6] Likewise, with respect to time, it is held that a bond payable at a certain time, but containing a condition by which the makers reserve the right "to pay the same at any time to be named by them," is not negotiable.[7] But the negotiability of a school-district bond, payable upon its face, at all events, to a named person, at a certain time, is not affected by a provision of the *statute* under which it was issued, that it should be payable at the pleasure of the district at any time before due.[8] Neither is the negotiable nature of securities of this kind, containing all the other requisite certainties of commercial paper, destroyed by the name of the payee being left blank;[9] for the holder may fill up the blank with his own name, or make them payable to himself or bearer, or to order.[10]

1 *McClelland v. Norfolk Southern R. Co.* 110 N. Y. 469, 475; S. C. 4 R'y & Corp. Law J. 545, citing *Everton v. National Bank*, 66 N. Y. 14; 23 Am. Rep. 9; Frank v. Wessels, 64 N. Y. 159; *Dinsmore v. Duncan*, 57 N. Y. 573, 580; 15 Am. Rep. 534; 1 Daniel on Negotiable Instruments, §§ 27-104.

2 *McClelland v. Norfolk Southern R. Co.* 117 N. Y. 469, 475; S. C. 4 R'y & Corp. Law J. 545, citing *Everton v. National Bank*, 66 N. Y. 14; 23 Am. Rep. 9; Frank v. Wessels, 64 N. Y. [illegible] *Dinsmore v. Duncan*, 57 N.

3 Jackson v. Vicksburgh etc. R. R. Co. 2 Wood, 141; Ledwick v. McKim, 53 N. Y. 307.

4 See cases cited *supra* and *infra*, and also Athenæum etc. Assurance Soc. v. Pooley, 3 De Gex & J. 294; Watson v. Mid-Wales R'y Co. Law R. 2 Com. P. 593.

5 *McClelland v. Norfolk Southern R. R. Co.* 110 N. Y. 469, 476; S. C. 4 R'y & Corp. Law J. 545.

6 Parsons v. Jackson, 99 U. S. 434. *Acc.* Jackson v. Vicksburg R. R. Co. 2 Wood, 141. *Cf.* Indiana etc. R. R. Co. v. Sprague, 103 U. S. 762; Jackson v. Ludeling, 99 U. S. 513; Rouede v. Jersey City, 18 Fed. Rep. 722.

7 Chouteau v. Allen, 70 Mo. 290.

8 Ackley School Dist. v. Hall, 113 U. S. 135; Indiana School Dist. v. Stone, 106 U. S. 183; Marine etc. Manuf. Co. v. Bradley, 105 U. S. 230.

9 Bronson v. La Crosse etc. R. R. Co 2 Wall. 283; Gelpcke v. Dubuque, 1 Wall. 176; Mercer County v. Hackett, 1 Wall. 83; White v. Vermont etc. R. R. Co. 21 How. 575, note; Finnegan v. Lee, 18 How. Pr. 186.

10 White v. Vermont etc. R. R. Co. 21 How. 575; Hubbard v. New York etc. R. R. Co. 14 Abb. Pr. 275; Chapin v. Vermont etc. R. R. Co. 6 Gray, 576.

§ 641. The same subject, continued—Of the effect of absence of negotiable words in coupons. It sometimes happens that coupons are made in the form of mere memoranda, containing no promise to pay.[1] There is a line of cases holding that an action cannot be maintained by the assignee of coupons which contain no negotiable words, nor language indicating an intention on the part of the corporation to treat them as negotiable paper, or as creating an obligation independent of the bonds to which they were originally attached;[2] and evidence of a commercial custom by which coupons of that character are treated as negotiable has been excluded.[3] It is said by an able text-writer that coupons of this kind are not complete instruments, and that they must be declared on in connection with the bonds to which they belong.[4] But there are a few cases in which a contrary doctrine is maintained.[5] And it is argued, with some appearance of reason, that the failure to designate a payee by name, or to make the coupons payable to bearer, or to use

negotiable words, does not affect their negotiability, since the evident intent of the payor is that the coupons should be payable to the purchaser of the bond or to the bearer.[6]

1 Woods v. Lawrence Co. 1 Black, 386; McCoy v. Washington Co. 3 Wall. Jr. 381.

2 *Evertson v. National Bank*, 66 N. Y. 14, 19, 20; 23 Am. Rep. 9, reversing S. C. 4 Hun, 692; Augusta Bank v. Augusta, 49 Me. 507; Jackson v. York etc. R. R. Co 48 Me. 147; Meyers v. York etc. R. R. Co. 43 Me. 232; Crosby v. New London etc. R. R. Co. 26 Conn. 121; Cranch v. Credit Foncier, Law R. 8 Q. B. 374. *Cf.* Daniel on Negotiable Instruments, § 1496 *et seq.*

3 Augusta Bank v. Augusta, 49 Me. 507.

4 Jones on Railroad Securities, § 317.

5 *White v. Vermont etc. R. R. Co.* 21 How. 575; McElrath v. Pittsburg R. R. Co. 55 Pa. St. 189; Beaver County v. Armstrong, 44 Pa. St. 63; Chapin v. Vermont etc. R. R. Co. 8 Gray, 575.

6 Woods v. Lawrence, 1 Black, 360; Smith v. County of Clark, 54 Miss. 58; Virginia etc. R. R. Co. v. Clay (MS. Va. unreported), cited in Daniel on Negotiable Instruments, § 1496. *Cf.* cases cited *supra*, § 640, notes 9 and 10. See, also, note to Morris Canal etc. Co. v. Fisher, in 64 Am. Dec. 428, 433.

§ 642. Lis pendens.—An exception to the doctrine of *lis pendens* is made in favor of negotiable paper, the object being to protect the commercial community by removing all obstacles to the free circulation of securities of that class.[1] So that, even though bonds or coupons were purchased during the pendency of a suit in which their issue was finally declared unconstitutional, the purchaser is not affected with notice thereof.[2] These considerations apply equally to securities created during, as to those created before the commencement of suit; and as well to controversies respecting their origin as to those respecting their transfer. Both are within the same mischief and the same reason.[3]

1 County of Warren v. Marcy, 97 U. S. 96, 109. See, also, cases cited in note to Morris Canal etc. Co. v. Fisher, 64 Am. Dec. 428, 439.

2 Marshall v. Fisher, 3 McCrary, 27, 9 Fed. Rep. 722, 723, 4 [illegible]

3 County of Warren v. Marcy, 97 U. S. 96, 107 Justices MILLER, FIELD and HARLAN dissenting; Lexington v. Butler, 14 Wall. 283.

§ 643. Of lost or stolen bonds.—A *bona-fide* purchaser of stolen bonds with coupons attached acquires a good title to the extent of the principal and of such of the coupons as have not matured.[1] Possession is *prima facie* evidence of ownership of securities of this character.[2] Negotiable paper constitutes an exception to the rule that one cannot give a better title to personal property than he has himself; so that as between the holder of coupon bonds purchased before maturity, and the real owner from whom they have been obtained by fraud or felony, the former has the superior title, unless he bought them *mala fide*.[3] But when the ownership and theft of bonds of a negotiable character has been proven, the burden of proof is then upon the defendant to show the good faith of his purchase.[4] And where there is no proof that any holder succeeding the thief acquired the stolen bonds before their dishonor as overdue paper, there is no presumption in favor of a subsequent purchaser that the thief originally negotiated them prior to maturity.[5] Where notice is served upon the obligor that bonds with coupons attached have been lost, it is said that he will be liable for interest paid thereafter, unless the holder, when he presents the paper, can show that he is an innocent holder. This being done, the original owner is without remedy.[6]

1 Hotchkiss v. National Banks, 21 Wall. 354; National Bank v. Texas, 20 Wall. 72; Murray v. Lardner, 2 Wall. 110; Gilbough v. Norfolk etc. R. R. Co. 1 Hughes, 410, and cases there cited; *Everston v. National Bank*, 66 N. Y. 14; 23 Am. Rep. 9; *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep.

2 Carr v. Le Fevre, 27 Pa. St. 413; "Ownership of Stolen Coupons," 6 Albany Law J. 235.

3 Fifth Ward Savings Bank v. First National Bank, 48 N. J. 513.

4 *Northampton National Bank v. Kidder*, 106 N. Y. 221, 229; 60 Am. Rep. 443; Bank of New York v. Carll, 55 N. Y. 440; Farmers' National Bank v. Noxon, 45 N. Y. 762; Bank of Cortland v. Green, 43 N. Y. 298.

5 *Northampton National Bank v. Kidder*, 106 N. Y. 221, 229; 60 Am. Rep. 443; Hinkley v. Merchants' National Bank, 131 Mass. 147.

6 Bainbridge v. Louisville, 83 Ky. 285, 289.

§ 644. Of the liability of an assignor of bonds and coupons.—A mere tranfer or assignment does not import a guaranty. At most it warrants the title of the transferrer, and not the solvency of the debtor or the collectibility of the *chose* assigned. The meaning of such a transfer without guaranty is that the transferree takes precisely the rights of the person from whom he obtains his title, and no more.[1] But if the assignee of a bond cannot recover it from the obligor by reason of the consideration for it having failed before the assignment was made, he may recover back from the assignor the money he paid for the assignment, whether he hold his guaranty or not.[2] And every obligee or holder of an obligation who assigns it to another, especially if he does so for a valuable consideration, does by implication thereby engage that it is genuine and binding upon the obligor; unless he discloses fully and truly to the assignee all the facts and circumstances connected with the execution and delivery of the obligation, and after being thus advised, the assignee agrees to take it at his own risk.[3] Upon this implied warranty of genuineness an assignee of a counterfeit bond may recover the money which he has paid his assignor.[4]

1 *Ketchum v. Duncan*, 96 U. S. 659, 671.

3 Flynn v. Allen, 57 Pa. St. 482, 485; Stroh v. Hess, 1 Watts & S. 153.

4 Utley v. Donaldson, 94 U. S. 29, 45; Flynn v. Allen, 57 Pa. St. 482; Benjamin on Sales, 56.

§ 645. Equities arising from the negotiation of State-aid bonds by the railway. — Under a statute authorizing the bonds of a State to be lent to a railroad company, to be negotiated by it, and providing that if the company did not pay the interest thereon, the State treasurer should by writ of sequestration seize and take possession of the income and revenues of the railroad, it was held that this created a lien upon the road and its income to secure the payment of the State bonds;[1] that, as between the State and the company, the latter was the primary debtor; and that the lien reserved to secure the payment of the bonds was primarily a security for the holders of the bonds.[2] Where a railroad has received and negotiated the bonds of a State under an agreement to pay the interest and principal thereof, and the performance of this obligation is secured by a statutory lien upon the road, this lien may still be enforced against the railroad, although, as against the State, the bonds have been judicially declared unconstitutional and void.[3]

1 *Tompkins v. Little Rock etc. R'y Co.* 15 Fed. Rep. 6, 11, 12. *Acc.* Florida Central R. R. Co. v. Schutte, 103 U. S. 118. *Cf.* Littlefield v. Boxam, 117 U. S. 420; Hay v. Railroad Co, 4 Hughes, 349; *Tompkins v. Little Rock etc. R. R. Co.* 5 McCrary, 602, 610; S. C. 18 Fed. Rep. 347, 352, 354; 21 Fed. Rep. 370.

2 *Tompkins v. Little Rock etc. R'y Co.* 15 Fed. Rep. 6.

3 *Tompkins v. Little Rock etc. R. R. Co.* 15 Fed. Rep. 6, 19, 20; Railroad Companies v. Schutte, 103 U. S. 118, 139, 140; Trustees v. Jacksonville etc. R. R. Co, 16 Fla. 708; State v. Florida Central R. R. Co. 15 Fla. 690.

§ 646. Of detached coupons.—Coupons for installments of interest, which have the requisite certainties of negotiable instruments, when severed

from their bonds before maturity pass from hand to hand by delivery, and possess all the characteristics of negotiable instruments.[1] They thereupon become independent claims, and cease to be mere incidents of the bonds; accordingly, they do not lose their validity if, for any cause, the bonds are canceled or paid before maturity, but retain all their negotiable characteristics.[2] It is generally held that coupons, being in the nature of promissory notes, and constituting a separate and independent contract between the corporation and any purchaser into whose hands they may have come, may be declared on without reference to the bond to which they were originally attached.[3] And although the coupons recite that they are for the interest upon certain bonds, designated by number, this does not destroy their negotiable nature when detached, nor require the production of the bond when suit is brought upon them.[4]

1 Stewart v. Lansing, 104 U. S. 505; Ohio v. Franck, 103 U. S. 697; Walnut v. Wade, 103 U. S. 683; *Ketchum v. Duncan*, 96 U. S. 659, *obiter*; *Cromwell v. Sac County*, 96 U. S. 58; Aurora v. West, 7 Wall. 82; Thomson v. Lee County, 3 Wall. 327; Bennington etc. Bank v. Mount Tabor, 52 Vt. 87; Philadelphia etc. . R. Co. v. Smith, 105 Pa. St. 195; Philadelphia etc. R. R. Co. v. Fidelity etc. Co. 105 Pa. St. 216. See, further, upon the Negotiability of Detached Coupons, 8 South. L. Rev. N. S. 358.

2 Clark v. Iowa City, 20 Wall. 583; Stewart v. Lansing, 104 U. S. 505; *Walnut v. Wade*, 103 U. S. 683.

3 Koshkonong v. Burton, 104 U. S. 668, affirming S. C. 4 Fed. Rep. 373; Amy v. Dubuque, 98 U. S. 470; Knox County v. Aspinwall, 21 How. 539; Clark v. Iowa City, 20 Wall. 583; Lexington v. Butler, 14 Wall. 282, 295; City v. Lamson, 9 Wall. 477; Thompson v. Lee County, 3 Wall. 327; First National Bank v. Bennington, 16 Blatchf. 53; Junction R. R. Co. v. Cleaneay, 13 Ind. 161. But see Crosby v. New London etc. R. R. Co. 26 Conn. 121; Shoemaker v. Goshen, 14 Ohio St. 569.

4 *Evertson v. National Bank*, 66 N. Y. 14; 23 Am. Rep. 9.

§ 647. **Of presentation and demand.**—Aside from the question of days of grace, a coupon becomes due and payable upon the day fixed by the terms of the bond.[1] It is none the less payable at

such times because the bond provides that the interest shall be paid on presenting or surrendering the proper coupon. This evidence, it is true, must be presented before the money can be demanded, and surrendered before the money can be paid, but it becomes due without any demand or presentation.[2] It is not a condition precedent to an action upon a coupon, payable by its terms at a certain place, that it should have been presented there for payment;[3] but if the obligor company provided funds to meet the coupons at the time and place of payment, this will be a defense to any claim for interest and costs.[4] Thus, in the case of coupons made in the form of checks, it is not essential for the maintenance of an action against the drawer that they should have been first presented to the bank, although the defendant may in such a case show that there were funds on deposit to meet them.[5] But neither demand nor notice is requisite in order to charge the drawer with the principal amount.[6]

1 Arents v. Commonwealth, 18 Gratt. 750, 776; 8 Vict. ch. 16, § 48.

2 Jones on Railroad Securities, § 325.

3 *Walnut v. Wade*, 103 U. S. 685; Warner v. Rising Fawn Iron Co. 3 Woods. 514; Smith v. Talla. oosa County, 2 Woods, 574.

4 *Walnut v. Wade*. 103 U. S. 683.

5 Arents v. Commonwealth. 18 Gratt. 750; Virginia etc. R. R. Co. v. Clay, M 3. cited by 2 Daniel on Negotiable Instruments, § 1,490. See note to Morris Canal etc. Co. v. Fisher, 64 Am. Dec. 428. 433.

6 Nashville v. Potomac Ins. Co. 2 Baxt. 296; Nashville v. First National Bank. 1 Baxt. 402.

§ 648. Of the time of payment —Bondholders cannot be compelled by the legislature or by the court to accept payment before maturity, nor to relinquish their lien.[1] Where a railway company, having issued mortgage bonds payable in thirty

years, indorsed upon them a memorandum of a contract which it entered into with another company with respect to the payment of earnings into a sinking fund for thirty years, or "for so long a time as will be sufficient to provide a fund large enough to redeem all of the bonds," it was held that the railway company did not thereby acquire a right to redeem the bonds when a fund sufficient for that purpose had accrued.[2] So, also, when bonds payable upon the expiration of a term of years contain a clause providing that they "will be redeemed, if desired," at a certain earlier date, it is with the holder, and not with the payer, to choose between the two times of payment.[3] It is provided by statute in England that the company may fix a time for the payment of its bonds and the interest thereon, and that this time shall be specified in the mortgage deed or in the bonds;[4] but that if no time be designated, payment may be made by the company or demanded by the bondholder at or after the expiration of twelve months, upon six months' notice previously given.[5] After the expiration of six months' notice given by the company, all further interest ceases to be payable.[6]

1 Randolph v. Middleton, 26 N. J. Eq. 543.

2 Chicago etc. R. R. Co. v. Pyne, 30 Fed. Rep. 86.

3 Allentown School District v. Derr, 115 Pa. St. 439.

4 8 Vict. ch. 16, § 50.

5 8 Vict. ch. 16, § 51, which also makes provision for the manner of serving notice upon the company by the bondholder, and upon the latter by the former.

6 8 Vict. ch. 16, § 52; 1 Hodges on Railways (7th ed.), 123.

§ 649. Of days of grace. Mere installments of interest are not entitled to grace.[1] But coupons containing negotiable words not mere install-

ments of interest; they are in the nature of promissory notes,[2] and carrying interest from maturity and demand,[3] being barred by limitation from their own date,[4] and capable of being declared on independently of the bonds to which originally attached,[5] they possess all the characteristics of separate and independent negotiable instruments. Accordingly, it is reasonable that they should be entitled to days of grace in the same manner as ordinary promissory notes. And it is held that a person who buys them before the expiration of the days of grace is a purchaser before maturity.[6] The authorities, however, are not uniform in so holding.[7] In a recent case in Massachusetts, it has been decided that bonds convertible into stock, and the coupons thereof, are not negotiable promissory notes within the meaning of the statute of that State relating to days of grace.[8] In California no negotiable instruments are entitled to days of grace.[9]

1 Randolph on Commercial Paper, § 16; Bank v. Leach, 52 N. Y. 350; Macloon v. Smith, 49 Wis. 200. *Cf.* Jackson v. Railroad Co. 48 Me. 147; Rose v. Bridgeport, 17 Conn. 243; Beaver v. Armstrong, 44 Pa. St. 63.

2 Hinkley v. Railroad Co. 129 Mass. 52.

3 *Walnut v. Wade*, 103 U. S. 683.

4 Clark v. Iowa City, 20 Wall. 583; Ferry v. Ferry, 2 Cush. 92.

5 Lexington v. Butler, 14 Wall. 282, 295; Knox Co. v. Aspinwall, 24 How. 376. *Cf.* School District v. Hall, 113 U. S. 135, 139, 140.

6 *Evertson v. National Bank*, 66 N. Y. 14, 18, 22; 23 Am. Rep. 9; Jones on Railroad Securities, § 326. *Cf.* Cooper v. Town of Thompson, 13 Blatchf. 434, 438.

7 Arents v. Commonwealth, 18 Gratt. 750; 2 Daniel on Negotiable Instruments, §§ 1490a, 1506. See cases cited in note to 64 Am. Dec. 423, 434.

8 Chaffee v. Middlesex R. R. Co. 146 Mass. 224; construing Mass. Pub. Stat. ch. 77, §§ 9, 10.

9 Cal. Civ. Code, § 3132.

§ 650. The effect of maturity upon the negoti-

and coupons are non-negotiable in the sense which relieves a purchaser from the obligation to inquire into the rights of antecedent holders;[1] the holder may, nevertheless, bring his action upon them;[2] and they are still negotiable, like other overdue commercial instruments, in that one who has taken them before or after maturity, and obtained a good title thereto, may transfer that title to another.[3] Although, of course, if taken, even by a *bona-fide* purchaser, for value, and without notice, they are subject to all the defenses and equities with which they would be affected in the hands of his transferrer.[4] The maturity of some of the coupons attached to a bond does not render the bond nor the other coupons overdue paper.[5]

1 *Northampton National Bank v. Kidder*, 106 N. Y. 221, 225; 60 Am. Rep. 443; Morgan v. United States, 103 U. S. 476, 499; Vermilye v. Adams Express Co. 21 Wall. 138, 145; Hinckley v. Merchants' National Bank, 131 Mass. 147.

2 Thompson v. Perrine, 106 U. S. 589. *Cf.* Chickaming v. Carpenter, 106 U. S. 663.

3 Thompson v. Perrine, 106 U. S. 589; *Cromwell v. Sac County*, 96 U. S. 53; Commissioners v. Balles, 94 U. S. 103; Commissioners v. Clark, 94 U. S. 279; McClure v. Township of Oxford, 94 U. S. 432; Grand Rapids R. R. Co. v. Sanders, 54 How. Pr. 214; Arents v. Commonwealth, 18 Gratt. 750.

4 Vermilye v. Adams Express Co. 21 Wall. 133; Hotchkiss v. National Banks, 21 Wall. 354; National Bank v. Texas, 20 Wall. 72; Murray v. Lardner, 2 Wall. 110; Gilbough v. Norfolk etc. R. R. Co. 1 Hughes, 410; *Evertson v. National Bank*, 66 N. Y. 14; S. C. 4 Hun, 692; 23 Am. Rep. 9; Arents v. Commonwealth, 18 Gratt. 750; *First National Bank v. County Commissioners*, 14 Minn. 77, 79; 100 Am. Dec. 194.

5 *Cromwell v. County of Sac*, 96 U. S. 51; National Bank v. Kirby, 108 Mass. 497. *Contra, First National Bank v. County Commissioners*, 14 Minn. 77; 100 Am. Dec. 194. See note to 64 Am. Dec. 428, 439.

§ 651. *Of interest upon* overdue bonds and coupons. — *Interest* is recoverable upon bonds which have matured, at the same percentage which they bore before maturity; and interest may be recovered upon overdue coupons also,[1] whether attached to the bond or severed and transferred to

another person.[3] A judgment rendered in Iowa upon coupons made in Iowa and payable in New York, but silent as to interest, will draw interest at the Iowa rate.[4] There is some conflict of authority upon the question whether presentation and demand are necessary to enable the holder of coupons to demand interest thereon. A few cases hold that it is requisite[5]—at least, where they are made payable upon "presentation."[6] There are numerous cases, however, in which it is said that interest is recoverable from the day upon which the coupons fall due and payment is unjustly *neglected* or refused, and, either thus by implication, or directly, asserting that demand is not requisite to charge the obligor with interest.[7] But it is difficult, upon examining these authorities, to determine how far they decide the question as to the necessity of presentation and demand; either on account of deficiency in the statements of fact, or because of modifying circumstances subsequently alluded to—as, for example, the fact that the obligor company had funds on hand to meet the coupons had they been presented,[8] or that, in case of coupons upon income bonds, there were no earnings from which they could be paid.[9] Accordingly, the better rule would seem to be that, in order to recover interest upon coupons which remain due and unpaid, the plaintiff need not allege presentation and demand, but that the defendant may by way of answer set up the fact, if such be the case, that funds were on hand at the place and time of payment to take up the coupons, had they been presented.[10]

Cf. Cook v. Fowler, Law R. 7 H. L. 27; Price v. Great Western R'y Co. 16 Mees. & W. 244.

2 Stewart v. Lansing, 104 U. S. 505; *Walnut v. Wade*, 103 U. S. 683; Ohio v. Frank, 103 U. S. 697; Genoa v. Woodruff, 92 U. S. 502; Aurora City v. West, 7 Wall. 82; Gelpcke v. Dubuque, 1 Wall. 206; Hollingsworth v. Detroit, 3 McLean, 472.

3 Rich v. Seneca Falls, 8 Fed. Rep 852; S. C. 19 Blatchf. 558; Philadelphia etc. R. R. Co. v. Smith, 105 Pa. St. 195; Philadelphia etc. R. R. Co. v. Fidelity etc. Co. 105 Pa. St. 216.

4 Rogers v. Lee County, 1 Dill. 529.

5 Phelps v. Lewistown, 15 Blatchf. 131, 159.

6 Corcoran v. Chesapeake etc. Canal Co. 1 MacA. 358, 366; Gelpcke v. Dubuque, 1 Wall. 206; Aurora City v. West, 7 Wall. 82.

7 Stewart v. Lansing, 104 U. S. 505; Ohio v. Frank, 103 U. S. 697; *Walnut v. Wade*, 103 U. S. 683, 696; Genoa v. Woodruff, 92 U. S. 502; Aurora City v. West, 7 Wall. 82, 105; Thompson v Lee County, 3 Wall. 327; Vose v. Philbrook, 3 Story, 336; Hollingsworth v. Detroit, 3 McLean, 472; Corcoran v. Chesapeake etc. Canal Co. 1 MacA. 358; Huey v. Macon (U. S. Cir. Ct. 1888), 4 R'y & Corp. Law J. 427; Williams v. Sherman, 7 Wend. 112; Delafield v. Illinois, 2 Hill, 177; Arents v. Commonwealth, 18 Gratt. 750; Philadelphia etc. R. R. Co. v. Smith, 105 Pa. St. 195; Philadelphia etc. R. R. Co. v. Fidelity etc. Co. 105 Pa. St. 216.

8 *Walnut v. Wade*, 103 U. S. 683; Arents v. Commonwealth, 18 Gratt. 750.

9 Corcoran v. Chesapeake etc. Canal Co. 1 MacA. 358, 365

10 See *Walnut v. Wade*, 103 U. S. 83; Arents v. Commonwealth, 18 Gratt. 750.

§ 652. Distinction between purchase and payment of coupons.—There is an important distinction between the payment of coupons by an authorized agent of the corporation, provided with corporate funds for that purpose, and a purchase of coupons by a person not acting for the corporation. In the former case, the coupons are extinguished and cease to be a lien upon the corporate property,[1] while in the latter, the lien continues to subsist.[2] Where a person made an agreement with a railway company to advance the money to pay its coupons, holding them as security, and in pursuance with this agreement deposited funds with the trust company, at whose office the coupons were made payable, for the purpose of paying them when presented, directing that they should be de-

livered to him uncanceled, to be held by him as security for the advancement, it was decided that this transaction was a *payment* of the coupon, and not a *purchase*, and that accordingly the party making the advancement was not entitled to share ratably in the proceeds of the mortgage, securing the bonds and coupons, with other bond and coupon holders.[3] It will be observed that in this case the coupons were paid through the agent of the company, at the usual place of payment, with money advanced to the company, under an agreement to advance money for that purpose; and the coupon-holders had a right to conclude that the money was paid by their debtors.[4]

1 People v. Cromwell, 102 N. Y. 477; *Crawford v. West Side Bank*, 100 N. Y. 50; 53 Am. Rep. 152; *People v. Merchants' etc. Bank*, 78 N. Y. 269; 34 Am. Rep. 532.

2 *Ketchum v. Duncan*, 96 U. S. 659, 662. *Cf.* Claflin v. Railroad Co. 4 Hughes, 36.

3 Union Trust Co. v. Monticello etc. R. R. Co. 63 N. Y. 311; 20 Am. Rep. 541. *Acc.* Cameron v. Tome, 64 Md. 507.

4 Comment upon Union Trust Co. v. Monticello etc. R. R. Co. 63 N. Y. 311, 20 Am. Rep. 541, in *Ketchum v. Duncan*, 96 U. S. 659, 667.

§ 653. The same subject, continued—The intention of the parties.—The question as between payment and purchase is not so much a matter of law as of fact. It is a question of the intention of the parties.[1] In a leading case on this subject, the plaintiff, a firm which was the financial agent of a railway company, in view of the inability of the company to meet its coupons when due, telegraphed to certain banks to purchase such of them as were there presented, and, charging the amount to the firm, to transmit the coupons to them uncanceled. These banks were not the customary places of payment. They had no funds of the railway on de-

posit. They charged the purchase-money to the plaintiff. There was no agreement between the plaintiff and the corporation that the former should advance the money to the company for the payment of the coupons. The firm was under no obligation to receive them, nor to pay them. Upon this state of facts, it was held to be clearly the intention of the plaintiff to purchase the coupons, and thereby to obtain the rights of purchasers against the company; and that the bondholders surrendering them were not warranted to believe that the plaintiff intended to pay them for the company, and to extinguish them as a lien upon the corporate property.[2] In another case, a promoter of a company, who owned all but five hundred of its twenty thousand shares of capital stock, instructed his brokers to call in such of the coupons as were due upon the corporate bonds. Notice was given the bondholders to present their coupons, and, so far as the evidence showed its character, this notice was that upon presentation the coupons would be *paid*, not *purchased*. The brokers received the coupons, and paid their holders the amount due thereon, and this amount was charged by them to their principal, the promoter, to whom they delivered the coupons. Upon receiving them, he punctured, or defaced, them all, writing the word "paid" across half of them, and in this condition delivered the coupons to material-men in payment of construction work. Upon the institution of foreclosure proceedings, the material-men intervened, claiming priority upon the coupons. But this was refused by the court.

business point of view, to be substantially identical with the company; and the other circumstances of the case were considered as evidence of an intention to *pay*, and not to *purchase*, the coupons. Accordingly, as he could not himself have obtained any preference upon the coupons over the foreclosing bondholders, neither could his transferrees, who had taken the coupons after maturity. The court reviewed and distinguished the case last cited above.[3]

1 Wood v. Guarantee etc. Co. 128 U. S. 416; 5 R'y & Corp. Law J. 114, 116.

2 *Ketchum v. Duncan*, 96 U. S. 659, 662.

3 Wood v. Guarantee etc. Co. 128 U. S. 416; 5 R'y & Corp. Law J. 114, 116.

§ 654. Of the statute of limitations as affecting coupons.—A suit on coupons will be barred by the same period that bars an action on the bonds to which they are attached.[1] That is to say, when the same period of time has relapsed after the maturity of a coupon that will bar an action on the bond, the coupon will be barred;[2] but the statute is not suspended, in so far as it affects coupons, until the maturity of the bond.[3] For the contract evidenced by a coupon is so far separate from the contract evidenced by the bond to which it is attached, that the statute begins to run immediately upon the maturity of the coupon itself.[4] But there are cases which regard the bond and the coupon as together constituting a single contract to pay the holder the amount of the bond at the expiration of a certain number of years, with semi-annual interest at a certain percentage per

the lapse of time which would bar a simple contract debt, but may be collected by suit until the statutory time has run against the bond [5]

1 *Huey v. Macon County*, and *Jones v. Macon County*, reported together (U. S. C. C. East Dist. Mo. N. W. Div. 1888), 4 R'y and Corp. Law J. 427, citing Amy v. Dubuque, 98 U. S. 470; City of Lexington v. Butler, 14 Wall. 286, and City v. Lamson, 9 Wall. 482.

2 *Huey v. Macon County* and *Jones v. Macon County*, reported together (U. S. C. C. East. Dist. Mo. N. W. Div. 1888,) 4 R'y and Corp. Law J. 427.

3 *Huey v. Macon County* and *Jones v. Macon County*, reported together (U. S. C. C. East. Dist. Mo. N. W. Div. 1888,) 4 R'y and Corp. Law J. 427, citing Amy v. Dubuque, 98 U. S. 474, and Clark v. Iowa City, 20 Wall. 583.

4 *Huey v. Macon County* and *Jones v. Macon County*, reported together (U. S. C. C. East. Dist. Mo. N. W. Div. 1888), R'y and Corp. Law J. 427. *Acc.* Clark v. Iowa City, 20 Wall. 583; Ferry v. Ferry, 2 Cush. 92. But see City v. Lamson, 9 Wall. 478.

5 City v. Lamson, 9 Wall. 473, reviewed in *McClelland v. Norfolk Southern R. R. Co.* 110 N. Y. 469; 4 R'y and Corp. Law J. 545.

CHAPTER XXV.

FORECLOSURE.

I.

§ 655. Introduction.
§ 656. The mortgage lien subordinate to the interest of the public in the railway as "a going concern."
§ 657. Of the mutual obligations of bondholders.
§ 658. Of the jurisdiction of State and federal courts.
§ 659. Of foreclosure upon a railway situated in two or more States.
§ 660. Of parties to foreclosure proceedings.
§ 661. The same subject continued.
§ 662. Foreclosure for interest before maturity of principal.
§ 663. Of entry for condition broken—"Six months' clauses"—Specific performance.
§ 664. "Six months' clauses," continued—The principal to become due upon default in payment of interest.
§ 665. The duty of the trustees to enter or foreclose upon request of a majority of bondholders.
§ 666. The rights and duties of trustees in possession of the mortgaged property.
§ 667. The right of a bondholder to institute suit upon the failure of the trustees to act.
§ 668. The right of entry not exclusive of other remedies

II.

§ 669. Of charges superior to the mortgage lien—Current expenses.
§ 670. The requisites of "current claims."
§ 671. The same subject continued.
§ 672. Of debts incurred by a receiver in operating the road.
§ 673. The same subject continued.
§ 674. The same subject continued—Expenses of a receiver a charge upon the *corpus*.
§ 675. Of statutory liens—Of equitable liens.
§ 676. Statutory liens in favor of laborers and mechanics.
§ 677. Of debts due the State.
§ 678. Of the lien of vendors of land.
§ 679. Of debts incurred for completing an unfinished line.

§ 681. Of the liens of judgment creditors.
§ 682. Of claims for damages, breach of contract, etc.
§ 683. The distinction between first charges upon income and prior liens upon the *corpus*.
§ 684. Cases in which priority has been refused.
§ 685. Of advancements to pay preferred claims—No right of subrogation.

III.

§ 686. Of the decree of sale—Provision for purchase by bondholders.
§ 687. The decree conclusive upon all parties having notice.
§ 688. Of the foreclosure sale.
§ 689. Of the purchaser's title.
§ 690. Of the distribution of the proceeds of sale among the bondholders.
§ 691. No priority as between holders of bonds and coupons secured by the same mortgage.
§ 692. Vacation of decree.
§ 693. The same subject, continued.
§ 694. Redemption.

I.

§ 655. Introduction.—The interpretation which the courts have put upon the contract between mortgagor and mortgagee has been so largely modified by modern legislation, that the practitioner will find it indispensable to consult the statutes in each case. The statutes of the various States distinguish between five modes of foreclosure procedure. These are, by *simple entry*, which still exists in Massachusetts, Maine, New Hampshire and Rhode Island; by *advertisement*, or publication, without possession, a practice authorized in Massachusetts, Maine and New Hampshire; by power of sale, as in New York, Massachusetts, Minnesota, Rhode Island, Illinois, Michigan, Wisconsin, Mississippi, Maryland, Missouri, California, Missouri, Dakota and Wyoming; by the old process of bill in equity, which is still authorized by the statutes of Massachusetts,

Rhode Island, New Jersey, Illinois, Minnesota, Georgia and Michigan; and finally, by an ordinary action in a court of law and a sale of the mortgaged property for the satisfaction of the debt. This is the prevailing method in most of the united American States.[1] In the United States courts the old common-law and equity practice is still preserved, and a mortgagee may pursue his legal remedy by ejectment, and at the same time file a bill to foreclose the equity of redemption. The objects of the two proceedings are distinct; and it is no objection to the remedy sought in equity that the plaintiff has another remedy which he may pursue at law.[2] After default demand is not necessary before action for foreclosure.[3] No other or further defenses are allowed in an action to foreclose a mortgage upon a railroad company to secure negotiable bonds than would be allowed in an action at law upon other negotiable instruments of that character.[4] The surplus after paying the mortgage debt is to be applied to the other liens upon the railway.[5] While negotiations for the sale of an entire railway system under a general mortgage are pending, an application, made by the trustees in an underlying mortgage, to have property covered by such mortgage turned over to receivers appointed in foreclosure proceedings, will be denied.[6]

1 *Vide* Stimson's Am. Stat. Law (Jan. 1, 1886), §§ 1920, 1925, where the statutes of the several States are cited and an exhaustive resume of the statutory law of the subject is given. See N. Y. Civ. Code, § 1626. In Kentucky and South Carolina foreclosure proper is abolished: Ky. Civ. Code (1876), § 375; S. C. Gen. Stat. (1882) § 229.

2 Hughes v. Edwards, 9 Wheat. 489.

3 Ferris v. Spooner, 102 N. Y. 10.

4 Kenicott v. Wayne County, 16 Wall. 452; Carpenter v. Longan, 16 Wall. 271.

5 Railroad Co. v. Howard, 7 Wall. 392.

6 Central Trust Co. v. Wabash etc. R'y Co. 25 Fed. Rep. 693.

§ 656. **The mortgage lien subordinate to the interests of the public in the railway as a "going concern."**—The mortgage creditors of railway corporations cannot proceed against the property of the company in exactly the same manner as in foreclosing upon the property of a private person. For a railway company is a public servant with a public function to discharge, and to that public duty the rights of mortgage creditors must be in some degree subordinated. The large sovereign powers given by the State to railway corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare of the people of the commonwealth; and the people have an interest in the maintenance of the undertaking as a "going concern," which is not to be defeated by its creditors.[1] It is true that the real and personal property necessary to the establishment and management of a railroad is vested in the corporation, but it is held in trust for the public. The company has not the general power of disposal incident to the absolute right of property; it is obliged to use it in a particular manner and for the accomplishment of a well-defined public object.[2] It is upon this principle that the current operating expenses of a railway, necessary to the continued performance of its duties to the public, are made a first charge upon its income, and even, in certain cases, a lien upon the property itself, superior to the claims of mortgage bondholders, as it is held that where the continuance of a railway as a "going concern" may be best secured by conferring upon its bondholders authority to

the operation of the road after a foreclosure of their mortgage, the State may, as the representative of the public, subordinate the claims of the minority of the bondholders dissenting from such an arrangement to the superior interest of the public in the continued operation of the road.[4] In England this doctrine has been carried to such an extent, that it has there been held that debentures in terms pledging the "undertaking" for the repayment of the money borrowed, do not confer upon the holders a right to foreclose and sell the property of the railway, but merely pass to the holder a prior right to payment out of the net earnings of the undertaking.[5] The American and English cases which apparently doubt these propositions, base their conclusions upon the construction of the particular charter powers and obligations of the companies in question.[6]

1 *Burnham v. Bowen*, 111 U. S. 776, 781; Worcester v. Western R. R. Co. 4 Met. 564; *Gates v. Boston etc. R. R. Co.* 53 Conn 333, 343; Railroad Commissioners v. Portland etc. R. R. Co. 63 Me. 269, 278, 279; 18 Am. Rep. 208; Gardner v. London etc. R'y Co. 36 Law J. Ch. 323; S. C. Law R. 2 Ch. 201; 1 Hodges on Railways (7th ed.), 127. *Cf.* Turness v. Caterham R'y Co. 25 Beav. 614; S. C. 27 Beav. 358; Myatt v. St. Helena R'y Co. 2 Q. B. 364.

2 *Railroad Commissioners v. Portland etc. R. R. Co.* 63 Me. 269, 278, 279; 18 Am. Rep. 208; quoting Worcester v. Western R. R. Co. 4 Met. 564, to the point that a railway may be compelled by *mandamus* to perform its duties to the public and to furnish adequate facilities therefor. See *People v. Albany etc. R. R. Co.* 24 N. Y. 261; 82 Am. Dec. 295; People v. Long Island etc. R. R. Co. 31 Hun, 127; State v. Hartford etc. R. R. Co. 29 Conn. 538; State v. West Wisconsin R. R. Co. 36 Wis. 466; State v. Southern Minnesota R. R. Co. 18 Minn. 40; High on Extraordinary Remedies, §§ 315, 316, 317.

3 *Vide infra*, § 671.

4 *Gates v. Boston etc. R. R. Co.* 53 Conn. 333.

5 Gardner v. London etc. R'y Co. Law R. 2 Ch. App. 201; 1 Hodges on Railways, 7th ed. 130; Browne & Theobald's Railway Law, 87.

6 *Gates v. Boston etc. R. R. Co.* 33 Conn. 333, 343, 344.

§ 657. Of the mutual obligations of bondholders.—The courts are frequently called on to decide between the conflicting interests of bondholders

secured by the same mortgage. The general principle is that community of interest involves mutual obligations;[1] and that neither a minority nor a majority of the bondholders will be allowed to disregard the rights of the others having a common interest with them in the same security. A minority of the bondholders secured by a mortgage have no right to enter into an agreement to purchase the railroad and mortgaged property at the lowest possible price, for the exclusive benefit of the parties to the agreement, with no reference to the other bondholders.[2] So, on the other hand, courts of equity will protect the interests of the minority as against the majority, and will remove receivers appointed at the instigation of the majority, where it appears that they are incompetent, and that some of them have interests in other corporations adverse to the interests of the minority mortgagees, and are using their influence and powers as receivers, in advancing those corporations, at the expense of the railroad.[3] Where a mortgage is of doubtful adequacy, even though executed directly to the bondholders by name, no single bondholder, although professing to act on behalf of all who may come in and contribute to the expenses of the suit, will be allowed to proceed alone and obtain a sale of the mortgaged property. For the sufficiency of the security being doubtful, all other creditors similarly situated are entitled to notice in order that they may come in and protect their interests. In a recent foreclosure suit brought by a small minority of the bondholders, upon default in payment of interest, the principal debt having [illegible] years yet to run,

it was held that dissenting bondholders should be allowed to purchase the bonds of those wishing to foreclose, and thereby put an end to the proceedings.[5] A small minority of bondholders, in the absence of fraud or unfairness, cannot be allowed to defeat the wishes of an overwhelming majority of those associated with them in the benefits of their common security, in respect to the legal proceedings to be taken in relation to it.[6] Where the mortgage provides that the bonds may be considered due by any bondholder on default in payment of interest and foreclosure, and be then enforced, a majority having availed themselves of the condition, a small minority should not be allowed to thwart their action.[7] And dissenting bondholders may sue in *assumpsit* for the amount of their unpaid coupons, notwithstanding the fact that the majority in interest have consented to waive the rights secured by the mortgage.[8] If the debenture holder has been paid out of the judgment, he cannot be brought back and treated as a trustee.[9]

1 *Jackson v. Ludeling*, 21 Wall 616.

2 *Jackson v. Ludeling*, 21 Wall. 616.

3 Atkins v. Wabash etc. R'y Co. 29 Fed. Rep 161.

4 Railway Co. v. Orr, 18 Wall. 471; Taylor on Corporations, § 815. *Cf.* Pennock v. Coe, 23 How. 117.

5 Tillinghast v Troy etc. R. R. Co. 48 Hun, 420. In this case the bonds were above par in the market.

6 Shaw v. Little Rock etc. R. R. Co. 100 U. S. 605, 612

7 *Gates v. Boston etc. R. R. Co.* 53 Conn. 333.

8 Manning v. Norfolk Southern R. R. Co. 29 Fed. Rep. 838.

9 Fountaine v. Cœrmarthen R'y Co. 5 Eq. 316, 324.

§ 658. Of the jurisdiction of State and federal courts.—On account of the diverse citizenship of

volving the foreclosure of railway mortgages are brought in the federal courts.[1] The rights of the judgment creditors of a railway company, who have established their liens in a State court, however, will not be prejudiced by a sale of the property of the railway in proceedings for foreclosure had in a federal court, they not having been joined as parties in the suit for foreclosure in the latter court.[2] And a federal court will not, at the instance of a mortgage creditor, restrain the enforcement of a judgment of a State court, obtained before foreclosure or the appointment of a receiver, against the mortgaged railway company upon obligations incurred in the operation of its road.[3] But, on the other hand, where, during the pendency of a suit in a State court to enforce a statutory lien on mortgaged property, for work done and material furnished, foreclosure proceedings are instituted in the United States court, and a receiver is appointed and takes possession, and the plaintiff in the first suit continues to prosecute it without obtaining leave of the latter court, and finally obtains judgment, and is decreed to be entitled to a lien for the amount due him upon the property, the federal court will not entertain a petition to have that judgment declared a lien on the property in its receiver's hands paramount to the lien of a mortgage creditor.[4] The United States Supreme Court will review a decision of a State court involving the validity of a transfer under the Bankruptcy Act.[5]

1 With regard to the bearing of the jurisdiction of the court, see Miller v. Memphis etc. R. R. Co. 3 Woods, 655; 2 McCrary, 94; S. C. 5 Fed. Rep. 552; 29 Fed. Rep. 495. See, generally, Federal and State Decisions as Affected by [illegible] on the [illegible] of Citizenship of a corporation on Dow, 91 U. S. 444; Copeland nis National Bank v. Allen, Chesapeake etc. R. R. Co. ect. Penner's Borderland of

2 Blair v. Walker, 26 Fed. Rep. 73.

3 Eells v. Johnson, 27 Fed. Rep. 337.

4 Blair v. St. Louis etc. R'y Co. 25 Fed. Rep. 2.

5 New Orleans etc. R. R. Co. v. Delaware, 114 U. S. 501; Fraser v. Clews, 115 U. S. 534.

§ 659. Of foreclosure upon a railway situated in two or more States.—On the foreclosure of a mortgage upon a railroad lying partly in one State and partly in another, a court of equity in one State may decree a sale of the entire road lying in both States, and direct a deed to the purchaser,[1] free from all liens except such as may exist under the laws of the other State.[2] In New York there is a general enabling act to facilitate the foreclosure of mortgages made by consolidated railway companies lying partly within that State and partly within other States, providing for the confirmation of the decree of sale in the foreign jurisdiction by one of the supreme courts of New York for the district in which some part of the railway shall be situated, and giving to the decree so confirmed the same force and effect as if originally made in that State.[3]

1 Miller v. Dows, 94 U. S. 444. As to the power to sell property as an entirety, though part is beyond the jurisdiction of the court, and, further, Miller v. Dows, 94 U. S. 444; Blackburn v. Selma etc. R. R. Co. 2 Flip. 525; Wilmer v. Atlantic etc. R. R. Co. 2 Woods, 447; Central Trust Co. v. Wabash etc. R. R. Co. 29 Fed. Rep. 620; Atkins v. Wabash etc. R. R. Co. 29 Fed. Rep. 173; Farmers' Loan and Trust Co. v. Chicago etc. R. R. Co. 27 Fed. Rep. 148; Hurd v. Savannah etc. R. R. Co. 12 S. C. 314; Mellrath v. Pittsburgh etc. R. R. Co. 55 Pa. St. 189; Randolph v. Wilmington etc. R. R. Co. 11 Phila. 102; Pepper's "Borderland of Federal and State Decisions," 88.

2 Hurd v. Savannah etc. R. R. Co. 12 S. C. 314. See, also, Taylor v. Atlantic etc. R. R. Co. 55 How. Pr. 275; 57 How. Pr. 26; In re United States Rolling Stock Co. 55 How. Pr. 286; 57 How. Pr. 16.

3 N. Y. Laws of 1879, ch. 505, § 1.

§ 660. Of parties to foreclosure proceedings.—Where the mortgage is made directly to the persons holding the bonds, all the bondholders should

be made parties to a suit for its foreclosure.[1] In that case no one of the bondholders can sue for himself and others who may come in. He must join them all as parties.[2] But when the mortgage securing the bonds has been made to trustees for the benefit of the bondholders, the latter need not be made parties to the suit;[3] for the trustees are competent to represent the interests of all their bondholders, and their acts are binding upon them all.[4] Bondholders are not, however, strangers to an action brought by the mortgage trustees to foreclose the mortgage, within the application of the rule excluding strangers from being heard upon motion or petition;[5] and any bondholder whose rights are endangered, is entitled to be made a party to the action.[6] The unsecured creditors of a railway company are not proper nor necessary parties to an action to foreclose a mortgage upon its property and franchises, neither have they any right to intervene; and any judgment therein against the mortgagor is binding upon them.[7] But in a case where a judgment for a small sum was recovered against a railway company, before it passed into the hands of a receiver, by a creditor, who lived at a distance from the court in which proceedings for foreclosure were subsequently had against the road, he was held entitled, in the course of such proceedings, to a full hearing, and to an exemption from the enforcement against him of technical rules.[8] Where the pleadings raise no question as to what property is covered by a mortgage, but the whole controversy turns upon the amount for which the decree shall be rendered, if

no right to interfere in an appellate court; nor can the purchasers of one division of the road be allowed to intervene upon foreclosure of a mortgage upon another division under such a state of pleadings, upon the ground that under their purchase, they obtained a right to the personal property, machinery, rolling-stock, franchises, rights and privileges of the entire road.[9] With respect to the individual stockholders, a judgment against the corporation is binding upon them, and they are not proper parties to the foreclosure proceedings;[10] and the shareholders cannot intervene, unless there be fraud or collusion on the part of the corporate officers having the management of the case.[11]

1 Nashville etc. R. R. Co. v. Orr, 18 Wall. 471; Chicago etc. R. R. Co. v. Howard, 7 Wall. 392.

2 Railroad Co. v. Orr, 18 Wall. 471.

3 Shaw v. Little Rock etc. R. R. Co. 100 U. S. 605; Chicago etc. R. R. Co. v. Howard, 7 Wall. 392; Vose v. Bronson, 6 Wall. 452.

4 Shaw v. Little Rock etc. R. R. Co. 100 U. S. 605; Credit Co. v. Arkansas Central R. R. Co. 5 McCrary, 30, 31; S. C. Fed. Rep. 52, 53. But see Appeal of Harrisburg etc. R. R. Co. (Pa. 1888) 22 Week. N. Cas. 417; where it was held that on a bill to adjudge void a mortgage given by a corporation and the bonds secured by it, the bondholders were necessary parties, and that service of process upon the trustees was not sufficient to bind them.

5 Anderson v. Jacksonville etc. R. R. Co. 2 Woods, 623.

6 Ex parte De Betz, 9 Abb. N. C. 246.

7 *Herring v. New York etc. R. R. Co.* 105 N. Y. 340, 370, citing Bronson v. La Crosse etc. R. R. Co. 2 Black, 524; Stoute v. Lye, 103 U. S. 63; *Candee v. Lord*, 2 N. Y. 269; 51 Am. Dec. 294.

8 Central Trust Co. v. Wabash etc. R'y Co. 27 Fed. Rep. 175.

9 Bronson v. La Crosse etc. R. R. Co. 2 Black, 524.

10 Chicago etc. R. R. Co. v. Howard, 7 Wall. 392.

11 Bronson v. La Crosse etc. R. R. Co. 2 Wall. 283; Forbes v. Memphis etc. R. R. Co. 2 Woods, 323. But see Chouteau v. Allen, 70 Mo. 290.

§ 661. **The same subject, continued.**—Second mortgagees should be made parties to a foreclosure of a first mortgage, when it is desired to cut off their

come mortgage is a necessary party to a suit for an accounting.[2] Ordinarily senior mortgagees are not necessary parties to a suit by junior mortgagees,[3] and will not be allowed to intervene;[4] for their lien cannot be affected thereby,[5] the junior mortgagees obtaining no priority by being the first to foreclose.[6] But if suit be brought by second mortgagees for the purpose of selling the property and quieting all outstanding titles,[7] and where the court is asked to appoint a receiver, the first mortgagees should be made parties.[8] In such a case the *res* in the hands of the court and subject to sale is the entire mortgaged property, and not merely the equity of redemption.[9] The indorsers of railway mortgage bonds, whether individuals or a State, have such an interest in the subject-matter as to render them proper parties to foreclosure proceedings; but in the absence of any enabling act giving a right to sue the State, it need not be made a party.[10] When the federal government holds a lien upon a railway, it seems that although it cannot be made a party defendant in proceedings to foreclose a mortgage, yet that its equities may be quieted by proper notice of the proceedings.[11] Where a railroad has passed into the control and management of the bondholders, they and their agents represent the railroad company for the purpose of being served with notices directed by law to be served on the railroad company.[12] To a bill filed by stockholders to set aside the foreclosure of a railroad mortgage the mortgage trustees are indispensable parties.[13]

4 Ex parte McHenry, 9 Abb. N. C. 286.

5 Young v. Montgomery etc. R. R. Co. 2 Woods, 606.

6 Jerome v. McCarter, 94 U. S. 734; Bronson v. La Crosse etc. R. R. Co. 2 Wall. 283; Howard v. Milwaukee etc. R. R. Co. 7 Biss. 73.

7 Jerome v. McCarter, 94 U. S. 734.

8 Miltenberger v. Logansport etc. R. R. Co. 106 U. S. 286.

9 Miltenberger v. Logansport etc. R. R. Co. 106 U. S. 286.

10 Davis v. Gray, 16 Wall. 203; Young v. Montgomery etc. R. R. Co. 2 Woods, 606; Wood's Railway Law, 1635.

11 Elliott v. Van Voorst, 3 Wall. Jr. 299; Wood's Railway Law, 1636.

12 Woodhouse v. Rio Grande R. R. Co. 67 Tex. 416.

13 Ribon v. Chicago etc. R. R. Co. 16 Wall. 446. See, also, Thayer v. Life Assoc. 112 U. S. 720; Evans v. Faxons, 11 Biss. 178; Mitchell v. Tillotson, 12 Fed. Rep. 738.

§ 662. Foreclosure for interest before maturity of principal.—Agreements in railway mortgages for the sale of the property upon default in payment of interest are construed to contemplate but one sale, and unless the property is capable of division without material injury, it must be sold in its entirety, although no part of the principal be yet due.[1] And where the interests involved demand a sale, upon a default in payment of interest, before maturity of the principal, the court may so decree, although such a course is not authorized by the terms of the mortgage.[2] A postponement of the sale on the ground that the railway was becoming more prosperous, has been refused where it was shown that notwithstanding its improving condition it would require ten years to pay the interest then due, out of the earnings of the undertaking.[3] Where the statute under which bonds are issued declares that they shall not be payable before a designated date, no stipulation in the mortgage that they shall become due upon default in payment of interest will operate to render them due

by the statute. In such a case, however, foreclosure proceedings may be instituted upon the failure of the company to pay the interest upon the bonds, and the decree may order the railway to be sold, and the proceeds, after payment of costs and the interest then due, to be paid into court for the purpose of meeting future installments of interest and the principal sum upon its maturity.[4]

1 Wilmer v. Atlanta etc. R. R. Co. 2 Woods, 447.
2 *McLane v. Placerville etc. R. R. Co.* 66 Cal. 606.
3 Duncan v. Atlantic etc. R. R. Co. 4 Hughes, 125.
4 Howell v. Western R. R. Co. 94 U. S. 463.

§ 663. **Of entry for condition broken—"Six months clauses"—Specific performance.**—Railway mortgage deeds are generally made to trustees for the benefit of the holders of the bonds thereby secured.[1] And it is frequently stipulated that within a certain time after breach of the conditions of the mortgage, the trustees may, on behalf of the bondholders and upon a written request of a majority of them, enter and take possession of the railway. Six months is the time generally agreed upon; and these provisions are called "six months clauses."[2] Under such an agreement the trustees may, without suit, lawfully take possession of the property and hold until the debt is satisfied;[3] or, if authorized by the terms of the deed, they may sell the railway and apply the proceeds to the payment of the debt.[4] It rarely occurs, however, that railway companies submit to entry without resistance; and, accordingly, the enforcement of these stipulations must be sought by bill in equity. The jurisdiction of courts of equity to enforce specific performance of the terms of mortgages providing for entry upon

conditions broken, is well established.[5] But the distinction between equitable proceedings for the purpose of enforcing specific performance of the terms of the deed and the ordinary foreclosure proceedings should be borne in mind.[6]

1 Butler v. Rahm, 43 Md. 541; *McLane v. Placerville etc. R. R. Co.* 66 Cal. 606.

2 *Cf.* 8 Vict. ch. 18, § 53.

3 Lee v. Swingly, 6 Mont. 536.

4 Mason v. York etc. R. R. Co. 52 Me. 82

5 Leeds v. Gifford, 41 N. J. Eq. 464; *McLane v. Placerville etc. R. R. Co.* 65 Cal. 609, 615; Sacramento etc. R. R. Co. v. Superior Court of San Francisco, 55 Cal. 453; American Bridge Co. v. Heidlebach, 94 U. S. 798; *Shepley v. Atlantic etc. R. R. Co.* 55 Me. 395; Shaw v. Norfolk County R. R. Co. 5 Gray, 162. *Cf.* Andrews v. Scotton, 2 Bland, 629, 665.

6 Upon this distinction, see *Shepley v. Atlantic etc. R. R. Co.* 55 Me. 395.

§ 664. "Six months clauses," continued—The principal to become due upon default in payment of interest.—The six months clauses frequently provide that the principal sum secured by the mortgage shall become due six months after default in payment of any one of the installments of interest. When this is the case, the bondholders do not waive their right to consider the principal as due by accepting payment of a part of the interest coupons.[1] But upon payment of the whole amount of interest due, the company may demand a surrender of its property after the trustees have entered, if there be nothing in the deed to the contrary and the principal is not yet due.[2] If the deed does not provide that the principal sum shall become due upon default in payment of interest, and the property is capable of division without material injury, the court may direct a sale of so much thereof as is sufficient to pay the interest, or it may order the railway to be leased and the interest to be paid out

of the rental arising therefrom.[3] In several of the American States there are statutes making provision for such cases.

1 *Northampton National Bank v. Kidder*, 106 N. Y. 221, 229; 60 Am. Rep. 443.

2 Union Trust Co. v. Missouri etc. R'y Co. 26 Fed. Rep. 485.

3 *Bardstown etc. R. R. Co. v. Metcalf*, 4 Met. (Ky.) 199; 81 Am. Dec. 541.

§ 665. The duty of the trustees to enter or foreclose upon request of a majority of bondholders.—It is frequently prescribed by the mortgage deed that it shall be the duty of the trustees, after default, to institute proceedings to enforce the rights of the bondholders, upon being requested so to do by the holders of a majority of the bonds.[1] But these provisions have been held not to preclude the mortgage trustees from foreclosing in a proper case without waiting for the request of the bondholders.[2] And even though the mortgage deed expressly prohibits the trustees from declaring the principal due upon default in payment of an interest installment, and from entering upon the property or foreclosing for the principal sum before the maturity of the bonds, unless requested to do so by the holders of a majority of them, it has been decided that they may foreclose for a failure to pay interest, at the request of a single bondholder.[3] Where provision was made in a deed of trust, executed by a railway company to secure its bonds, for a sale in case of a default in payment of any of the bonds, and it was further made the duty of the trustees, under such circumstances, to sell upon the request of a majority in interest of

sale until the number of bonds due could be determined.[4]

1 *Beckman v. Hudson River etc. R'y Co.* (U. S. C. C. So. Dist. N. Y. 1838), 4 R'y & Corp. Law J. 220; State v. Brown, 64 Md. 199; First National etc. Ins. Co. v. Salisbury, 130 Mass. 303.

2 First National etc. Ins. Co. v. Salisbury, 130 Mass. 303.

3 Farmers' Loan & Trust Co. v. Chicago etc. R'y Co. 27 Fed. Rep 146.

4 State v. Brown, 64 Md. 199.

§ 666. **The rights and duties of trustees in possession of the mortgaged property.**—The trustees of a railroad mortgage, having obtained a decree entitling them to possession of the road under the provisions of the mortgage, are also entitled, there being no debts for current expenses, to receive all profits earned by the road since the commencement of the suit, the effect of the decree being to establish their right of possession at the time the suit was begun, and to make the company's possession after that date wrongful.[1] Having entered upon the property, the trustees may operate the railway and exercise the franchises of the company so far as is necessary for the interests of the bondholders, and as long as is requisite to the payment of the mortgage debt.[2] Trustees entering for condition broken, in addition to their fiduciary duties to the bondholders, secured by the deed under which they act, do also assume a position of trust toward the corporation and the other corporate creditors.[3] Their primary duty, however, is to protect the rights of their own bondholders, and they cannot consent to the payment of other claims until their own bondholders have been paid or secured.[4]

1 Dow v. Memphis etc. R. R. Co. 124 U. S. 652.

2 *Wood v. Goodwin*, 49 Me. 260; 77 Am. Dec. 259.

3 Sturgis v. Knapp, 31 Vt. 1; Ashuelot R. R. Co. v. Elliott, 57 N H. 397.

4 Duncan v. Mobile etc. R. R. Co. 2 Woods, 542

§ 667. The right of a bondholder to institute suit upon the failure of the trustees to act.—If, upon breach of the conditions of the mortgage, the trustees refuse or neglect to act upon the request of the bondholders to institute proceedings, any single bondholder may bring an action in his own name, and for such of the other bondholders as may desire to be made parties plaintiff,[1] joining the trustees as parties defendant,[2] and duly serving them with process.[3] To maintain their action, however, the bondholders must show clearly the neglect or refusal of the trustees to act upon a request properly made;[4] and that they are *bona-fide* holders and owners of the bonds secured by the mortgage.[5] Although suit may have been begun by the bondholders, the trustees, unless their interests are adverse, will be allowed to come in and take charge of the further conduct of the case.[6] It has been argued that if the trustees, upon the request of a majority of the bondholders to institute foreclosure proceedings to recover the interest and principal of the amount secured by the mortgage, bring their suit in a court not having jurisdiction of the subject-matter, this will constitute such a refusal to comply with the request as will warrant any one of the bondholders in bringing suit in his own name in a court of competent jurisdiction.[7] The pending of a foreclosure suit, brought in a State court by the trustees of a railway mortgage, is no bar to a similar suit by one of the holders of

court.[8] Where the trustees of a railroad mortgage or deed of trust are dead, a bill of foreclosure and sale may be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders secured by the same mortgage; or, if there be several successive mortgages, the trustees of which are dead, and the complainants hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all the other bondholders under each mortgage.[9]

1 Webb v. Vermont Central R. R. Co. 20 Blatchf. 218; Wilmer v. Atlanta etc. R. R. Co. 2 Woods, 447; Alexander v. Central etc. R. R. Co. 3 Dill. 437; Wutgen v. St. Paul etc. R. R. Co. 4 Hun, 529; *March v. Eastern R. R. Co.* 40 N. H. 548; 77 Am. Dec. 732; Mason v. York etc. R. R. Co. 52 Me. 82; Jessup v. City Bank, 14 Wis. 331.

2 Wutgen v. St. Paul etc. R. R. Co. 4 Hun, 529.

3 Morgan v. Kansas Pacific R. R. Co. 15 Fed. Rep. 55.

4 Knapp v. Railroad Co. 20 Wall. 117; *Galveston R. R. Co. v Cowdrey*, 11 Wall. 459; Campbell v. Railroad Co. 1 Woods, 368.

5 Jessup v. City Bank, 14 Wis. 331.

6 Richards v. Chesapeake etc. R. R. Co. 1 Hughes (U. S. Cir. Ct.), 28.

7 But the question was left undecided, the court saying: "This suit may, in any event, be sustained for interest due; whether it can be sustained for principal may be determined upon the trial": *Beekman v. Hudson River etc. R'y Co.* (U. S. C. C. So. Dist. N. Y. 1883), 4 R'y & Corp. Law J. 220, 223, citing Railroad Co. v. Fosdick, 106 U. S. 47.

8 *Beekman v. Hudson River etc. R'y Co.* (U. S. C. C. So. Dist. N. Y. 1883), 4 R'y & Corp. Law J. 220, 223, citing Insurance Co. v. Brune, 96 U. S. 588; Stanton v. Embrey, 93 U. S. 548; Weaver v. Field, 16 Fed. Rep. 22.

9 *Galveston etc. R. R. Co. v. Cowdrey*, 11 Wall. 459.

§ 668. The right of entry not exclusive of other remedies.—The provisions of the six months clauses with respect to entry by the trustees are not exclusive. And in England it seems that mortgages and bond creditors have the ordinary rights of creditors against the company in addition to the other remedies given them by the Companies' Clauses Act.[1] But a debenture holder and bondholder can issue execution only as a trustee for all the other debenture holders.[2] A suit in equity for

the foreclosure of a mortgage upon the property of a railway company may be brought immediately upon default in the payment of interest on the bonds secured by the mortgage, notwithstanding provisions in the mortgage which authorize entry and actions at law only in case default in the payment of interest shall continue for six months. The six months clauses are not applicable by inference to suits in equity, and courts will not extend them so as to bar such suits unless the language of the provision is clear,[3] unless the mortgage exclude this right in express terms or by necessary implication.[4] A mortgagee or bondholder may take measures in chancery to protect his security before the money is payable.[5] Where no time was fixed for the repayment of money borrowed on the security of tolls, it was held that a mortgagee who had given notice requiring payment in six months was entitled to a receiver, though no interest was in arrear.[6] The procedure prescribed in the mortgage deed in the event of an entry by the trustees is not binding upon the court in foreclosure proceedings.[7] In a declaration upon income bond coupons, it is necessary to allege and to prove the existence of net revenue.[8] In declaring upon coupons, they should be identified by the number of the bond, the date, the amount, and time of payment;[9] but if a declaration be in general terms, it will suffice, if the relation of the coupons to the bonds is clearly explained.[10] Assumpsit will lie upon unsealed coupons, although the bonds to which they were originally attached were under seal.[11]

1 8 Vict. ch. 16, §§ 42, 44; Russell v. East Anglian R'y Co. 3 Macn. & G. 125; 6 Rob. C. 501; Browne & Theobald's Railway Law, 88.

2 Bowen v. Brecon R'y Co. 3 Eq. 541. See, however, In re Potteries etc. R'y Co. 5 Ch. 67, 60.

3 *Mercantile Trust Co. v. Missouri, Kansas & Texas R'y Co.* (1886) 36 Fed. Rep. 221; S. C. 4 R'y & Corp. Law J. 362, following *Chicago etc. R. R. Co. v. Fosdick*, 106 U. S. 47. *Acc.* Central Trust Co v. New York City etc. R. R. Co. 33 Hun, 513; Tyson v. Weber, 81 Ala. 470. *Cf.* Hart v. Eastern Union R'y Co. 7 Ex. 246; S. C. 8 Ex. 116; Price v. Great Western R'y Co. 16 Mees. & W. 244.

4 Manning v. Norfolk Southern R. R. Co. 29 Fed. Rep, 838.

5 Legg v. Mathieson, 2 Giff. 71; Wildy v. Mid-Hants R'y Co. 16 Week. R. 409; Browne & Theobald's Railway Law, 87.

6 Hopkins v. Worcester etc. Canal Proprietors, 6 Eq. 437; Walsh v. Dublin etc. Board, 7 Law R. Ir. 533; Browne & Theobald's Railway Law, 87.

7 Farmers' Loan and Trust Co. v. Green Bay etc. R. R. Co. 10 Biss. 203.

8 Corcoran v. Chesapeake etc. Canal Co. 1 McAr. 358.

9 Kennard v. Cass County, 3 Dill. 147.

10 City v. Lamson, 9 Wall. 477.

11 First National Bank v. Bennington, 16 Blatchf. 53.

II.

§ 669. **Of charges superior to the mortgage lien—Current expenses.**—Upon the principle explained in a foregoing section,[1] that mortgage liens are subordinate to the interest of the public in the continuance of the railway as a going concern, debts incurred in operating the road are made by law a first charge upon the income of the company, paramount not only to the claims of creditors secured by a mortgage of the *corpus* of the property,[2] but also to the claims of income mortgagees.[3] And every railroad mortgagee, in accepting his security, is deemed by legal implication to agree that the current debts made in the ordinary course of business shall be paid from the current receipts before he shall have any claim upon the income.[4] It frequently happens that debts for labor, supplies, equipment and improvements are permitted to accumulate, in order that bonded interest may be paid, to postpone or avoid foreclosure. In this

way the daily and monthly earnings which should go to pay the daily and monthly expenses are kept from those to whom in equity they belong.[5] If then for the convenience of the moment something is taken from the current debt fund and put into that which belongs to the mortgage creditors, the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, may equitably require as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts, before anything derived from that source goes to the mortgagees, thus doing only what the company ought itself to do, had a receiver not been appointed.[6] And if the earnings of the railway while in the hands of the court, prove insufficient to make good the deficit in the current expense fund caused by a diversion of earnings to the payment of interest on the mortgage bonds, the court may order the current expenses to be paid from the proceeds of the foreclosure sale.[7] But the equitable right of one claiming payment for operating expenses of a railroad, to hold the bondholders for current earnings misapplied by payment to them, does not exist against holders of second mortgage bonds for earnings misapplied by payment of interest on first mortgage bonds.[8] The measure of recovery against a railway company, after it has passed into the hands of a receiver, on a lien for personal property sold to the company, is the present value of the property.[9]

1 *Vide supra*, § 658.

2 *Calhoun v. St. Louis etc. R. R. Co.* 14 Fed. Rep. 9; and cases cited *infra*.

3 *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459-483. The code of Mississippi provides that no mortgage on the income, future earnings, or rolling-stock of a railway shall have priority over debts contracted in carrying on the business of the company: Miss. Code, § 1013. But see Farmers' Loan and Trust Co. v. Vicksburg etc. R. R. Co. 33 Fed. R. p. 778, where it is held that this section does not give a prior lien to the holders of such claims, but merely prevents those claiming a prior lien under the mortgage from setting it up to defeat such claims.

4 *Fosdick v. Schall*, 99 U. S. 235, 252.

5 *Fosdick v. Schall*, 99 U. S. 235, 252.

6 *Burnham v. Bowen*, 111 U. S. 776, 783; *Fosdick v. Schall*, 99 U. S. 235, 252, 253; Huidekoper v. Locomotive Works, 99 U. S. 258, 260; *Hale v. Frost*, 99 U. S. 389; American Bridge Co. v. Heidelbach, 94 U. S. 798; Gilman v. Illinois etc. Telegraph Co 91 U. S. 603; Schutte v. Florida etc. R. R. Co. 3 Woods, 692, 712; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459; Turner v. Indianapolis etc. R. R. Co. 8 Biss. 315; *Calhoun v. St. Louis etc. R. R. Co.* 14 Fed. Rep. 9; Williamson v. Washington City etc. R. R. Co. 33 Gratt. 624.

7 Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434. *Vide infra*, § 683.

8 St. Louis etc. R. R. Co. v. Cleveland etc. R'y Co. 8 Sup. Ct. Rep. 1011.

9 Central Trust Co. v. Texas etc. R'y Co. 27 Fed. Rep. 178.

§ 670. The requisites of "current claims."—To bring a claim against a railroad, pending foreclosure proceedings, within the preference accorded to "current" expenses, it is generally held to be requisite that it should be founded upon services rendered or materials supplied either after the bringing of the foreclosure suit, or within six months or a year before.[1] Not only debts incurred for operating expenses and repairs, but also those contracted for betterments shown to have been absolutely necessary, are entitled to the benefit of the rule.[2] But there may be circumstances which will entitle claims of longer standing to be considered "current," as where services are rendered or supplies furnished under a continuous contract.[3] Thus, where supplies for rebuilding bridges, constructing side-tracks, and making repairs, were furnished a railway company at various times under a continuous verbal agreement made after

default in payment of interest on the company's bonded indebtedness, and which was not terminated until the appointment of a receiver, more than two years after the supplies were furnished, it was held that notwithstanding the statute of frauds, the material-men were, under the circumstances, entitled to judgment for balances due them, and to a lien for the amount upon the earnings of the company, superior to the mortgagees.[4] And when the annual *salary* of the attorney of a railway company falls due only a short time before the road is placed in the hands of a receiver, his claim against the company is entitled to priority over the mortgage bondholders.[5] But the attorney's claim for *fees* earned a year and a half before the appointment of a receiver, is not entitled to any preference.[6]

1 *Burnham v. Bowen*, 111 U. S. 776, 782; Union Trust Co. v. Soutter, 107 U. S. 591; Farmers' Loan & Trust Co. v. Vicksburg etc. R. R. Co. 33 Fed. Rep. 773; Blair v. St. Louis etc. R. R. Co. 22 Fed. Rep. 471; S. C. 23 Fed. Rep. 521; S. C. 33 Fed. Rep. 778; Langdon v. Vermont etc. R. R. Co. 51 Vt. 593.

2 Farmers' Loan & Trust Co. v. Vicksburg etc. R. R. Co. 33 Fed. Rep. 778. See further upon this point, RECEIVER'S CERTIFICATES, *infra*.

3 Blair v. St. Louis etc. R'y Co. 22 Fed. Rep. 769.

4 Blair v. St. Louis etc. R'y Co. 23 Fed. Rep. 21.

5 Blair v. St. Louis etc. R'y Co. 23 Fed. Rep. 21.

6 Blair v. St. Louis etc. R'y Co. 23 Fed. Rep. 21.

§ 671. The same subject, continued.—While the limit of six months has been fixed in many cases, there seems to be no good reason why any time should be arbitrarily named. The question to be considered in this class of cases evidently is, whether the claim has become stale, whether it has sunk into what is called an ordinary floating debt?

upon the facts of each particular case.[1] If it has become a floating debt, it will not be entitled to preference.[2] Where the default in payment of interest occurred more than eight months before a receiver was appointed, wages earned after the default and before the appointment were given priority, though no special equities were shown.[3] In another case, claims for labor done during the year preceding the appointment, which had not been assigned, were allowed against the receiver's net income;[4] and, in a later case, it was held that it is not material whether the claims have been assigned or not.[5] So, also, priority has been allowed upon claims for services rendered during the two years before the receiver was appointed.[6] The practice has been carried still further, in a case where notes given by a railroad company for money used to pay for wages due, so as to avoid a strike which was threatened, and which were to be paid out of the net income, were given preference in payment out of the income of a receiver appointed twenty-two months after the transaction.[7] It is well settled that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage.[8] But when demand has been made for possession by filing suit, the company must from that time account for earnings, and it is immaterial that a receiver was not appointed, the company itself being treated in all respects as a receiver of the property, holding for the benefit of whomsoever

in the end it should be found to concern.[9] Where a system of roads owned and operated by a single company is covered by general mortgages, and some of its branches by local underlying mortgages, and the entire system is placed in the hands of receivers in proceedings to foreclose the general mortgages, the earnings of the system should, as a rule, be apportioned among the different divisions for payment of taxes and interest on underlying mortgages upon a mileage basis.[10] The ordinary rules of business should be observed, however, and a larger proportion of the earnings may properly be expended upon one division than upon others, in case it is necessary to the prosperity of the system as a whole.[11] Preferred debts for work done and materials furnished, incurred in the operation of a division of a system of railroads, owned and operated by a single corporation, are a lien upon all the lines of the system, prior in right to both local and general mortgages.[12] The mere fact that some of the lines of such a system have been paying, and others not, does not justify a casting of the entire burden of the preferred debt upon the latter.[13]

1 Turner v. Indianapolis etc. R. R. Co. 8 Biss. 315; Beach on Receivers, § 369.

2 Duncan v Mobile etc. R R Co. 2 Woods, 542; Brown v. New York etc. R'y Co. 19 How. Pr. 84; Huidekoper v. Locomotive Works, 99 U. S. 258.

3 Douglas v. Cline, 12 Bush, 608.

4 Skildy v. Atlantic etc. R. R. Co. 3 Hughes, 320.

5 Union Trust Co. v. Walker, 107 U. S. 596.

6 Williamson v. Washington City etc. R. R. Co. 33 Gratt. 624. See, also, generally, as to time, Central Trust Co. v. Texas etc. R'y, 22 Fed. Rep. 135.

7 Atkins v. Petersburg R. R. Co. 3 Hughes, 307; Beach on Receivers, § 339.

8 Dow v. Memphis etc. R. R. Co. 124 U. S. 652, 654; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459, 483.

9 Dow v. Memphis R. R. Co. 124 U. S. 652, 655; *Galveston R. R. Co. v.*

10 Central Trust Co. v. Wabash etc. R. R. Co. 30 Fed. Rep. 332.
11 Central Trust Co. v. Wabash etc. R. R. Co. 30 Fed. Rep. 332.
12 Central Trust Co. v. Wabash etc. R. R. Co. 30 Fed. Rep. 332.
13 Central Trust Co. v. Wabash etc. R. R. Co. 30 Fed. Rep. 332.

§ 672. Of debts incurred by a receiver in operating the road.—The fact that receivers, with power to manage and operate railroad property, are appointed at the suit of bondholders in proceedings to foreclose their liens and for their own benefit, implies consent on their part that all expenses incurred by the receiver in the duties of his office shall be paid out of the fund in his hands. Since it is impossible for him to operate a road without incurring debts, it is entirely reasonable that the property which is to be benefited by his management shall bear the cost of it. It is equally reasonable that his necessary expenses in operating and managing the road shall constitute a lien in preference to all other obligations; otherwise he would be unable to secure supplies or employ assistance.[1] Accordingly, items for wages due employees within six months immediately preceding the appointment of a receiver, debts due to other railroad companies and for supplies and damages, debts incurred for the ordinary expenses of the receivers in operating the road, may be allowed priority out of the earnings, and, if there is no income fund, after scrutiny and opportun ty for those opposing to be heard, then out of the trust property itself.[2] An additional reason for recognizing this principle has been stated to be, that, as the mortgagee has invoked the extraordinary aid of a court of equity by obtaining the appointment of a receiver, instead of availing himself of the ordinary remedies at law

to obtain possession and enforce his lien, a court of equity may impose such reasonable conditions to the relief sought by him as it may deem are required by all the circumstances of the case. And when a mortgagee has delayed the enforcement of his rights after default, and allowed the corporation to incur new debts for operating expenses and for the maintenance of its property, the contention becomes still stronger and more effective.[3] Debts incurred by the receiver in operating the road are held to be capable of assignment, the preference as to payment being considered as being attached to the debt itself and not to the creditor.[4] But expenses attending negotiations among bondholders having in view the sale of the road and its purchase by them, have been considered as not proper to be paid by the receiver, especially as it appeared that there was no surplus in the receiver's hands, and that it was not certain that the negotiations would be carried into effect and the sale made in pursuance thereof.[5]

1 Wallace v. Loomis, 97 U. S. 146; Miltenberger v. Logansport R. R. Co. 106 U. S. 286. See also Taylor v. Philadelphia R. R. Co. 7 Fed. Rep. 377; Atkins v. Petersburg R. R. Co. 3 Hughes, 337; Beach on Receivers, § 367. See also RECEIVER'S CERTIFICATES, *infra*. *Contra*, Denniston v. Chicago etc. R. R. Co. 4 Biss. 414.

2 Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434 (1886). To the same effect see Duncan v. Trustees of Chesapeake etc. R. R. Co. 9 Am. R'y Rep. 386; Beach on Receivers, § 359. But see *Metropolitan Trust Co. v. Tonawanda R. R. Co.* 103 N. Y. 245.

3 Union Trust Co. v. Soutter, 107 U. S. 591; Douglas v. Cline, 12 Bush, 608; *Fosdick v. Schall*, 99 U. S. 235; *Burnham v. Bowen*, 111 U. S. 776; and cases cited *supra*, § 671.

4 *Burnham v. Bowen*, 111 U. S. 776; Union Trust Co. v. Walker, 107 U. S. 593. But see, *contra*, Skiddy v. Atlantic etc. R'y Co. 3 Hughes, 320.

5 Central Trust Co. v. Wabash etc. R. R. Co. 25 Fed. Rep. 69. See further, RECEIVER'S CERTIFICATES, *infra;* also, Beach on Receivers, § 357 and § 379 *et seq.*

§ **673. The same subject, continued.**—Where a receiver has been appointed, the proceeds and

profits of the business in his hands are subject, first, to the charges of administration and management, and then to the liens and trust in behalf of which the receiver was appointed; that neither the railroad company itself, nor any party whose claim is based on the company's rights, can demand any of the income in the receiver's hands until the prior liens have been satisfied.[1] In a leading case it was broadly held that the net earnings of a receiver are not exclusively or necessarily the property of mortgagees, but may be disposed of by the court, if necessary, to pay such claims as present superior equities, and the court gave preference to a claim for materials and supplies furnished before the receiver was appointed but used by him while operating the road, out of the net income, although the claim was in the shape of a note given three years before the appointment.[2] And the same court approved the action of a lower court in authorizing its receiver to pay, in preference to the mortgage indebtedness, amounts due for materials and repairs, and for ticket and freight balances due to other roads before the receivership, as well as for rolling-stock purchased by the receiver, and expenses in completing an additional line and a bridge.[3]

1 Schutte v. Florida R. R. Co. 3 Woods, 692, 712; Beach on Receivers § 376.

2 *Hale v. Frost*, 99 U. S. 389; Beach on Receivers, § 370.

3 Miltenberger v. Logansport R. R. Co. 106 U. S. 286; Beach on Receivers, § 370.

§ 674. The same subject, continued—Expenses of a receiver a charge upon the corpus.—Where a receiver is appointed pending the foreclosure of a railway mortgage, the expenses incurred by him in

the operation of the road, the remuneration for his services and a reasonable attorney's fee, constitute charges not only upon the income, but also upon the proceeds of the sale, prior to the lien of the mortgage bondholders.[1] But in order to make the *corpus* liable for such debts in preference to bondholders, the priority must be specially authorized by the court. An order simply authorizing him to pay operating expenses out of the income is plainly insufficient.[2] The receiver himself cannot charge the *corpus* of the mortgaged property with the payment of any debts he may make. He is closely restricted to the income and profits of the road which he operates and manages.[3] The extent to which this power of encroachment upon the *corpus* may be exercised by the court has not been determined. It has been resorted to in order to enable a receiver "to raise money necessary for the preservation and management of the property;"[4] to build bridges,[5] and to complete the building of an unfinished road.[6] So, also, wages due employees at the time the receiver took possession, have been directed to be paid out of the earnings, or out of the trust property.[7] Priority for claims on account of current expenses will not be allowed unless special equities are shown entitling the claimants to priority over the mortgage indebtedness.[8]

1 Hale v. Nashua etc. R. R. Co. 60 N. H. 333: *McLane v. Placerville etc. R. R. Co.* 66 Cal. 606. *Vide infra*, RECEIVER'S CERTIFICATES.

2 Hand v. Savannah etc. R. R. Co. 17 S. C. 219; Blair v. St. Louis etc. R. R. Co. 22 Fed. Rep. 471; Beach on Receivers, § 377.

3 Hand v. Savannah etc R. R. Co. 17 S. C. 219; Vermont etc. R. R. Co. v. Vermont Central R. R. Co. 50 Vt. 500; Beach on Receivers, § 377.

4 Wallace v. Loomis, 97 U. S. 146.

5 Miltenberger v. Logansport R. R. Co. 106 U. S. 286.

6 Kennedy v. St. Paul etc. R. R. Co. 2 Dill. 448; S. C. 5 Dill. 519; Beach on Receivers, § 377.

7 Duncan v. Trustees of Chesapeake etc. R. R. Co. 9 Am. Railway Rep. 38; Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434 (1886); *Metropolitan Trust Co. v. Tonawanda Valley etc. R. R. Co.* 103 N. Y. 245.

8 Blair v. St. Louis etc. R. R. Co. 22 Fed. Rep. 471; Beach on Receivers, § 377.

§ 675. Of statutory liens—Of equitable liens.—Where a statute gives a lien upon railway property to creditors who furnish labor or supplies, such lien will not be affected by the appointment of a receiver in a proceeding by bondholders for foreclosure. So where a statute conferred the right to attach rolling-stock and other personal property of a railroad company, and subjected the rights of mortgage creditors to those of the attaching creditors, it was held that the creditors entitled to the attachment might pursue their remedy, and if it proved insufficient to pay their claims they would be preferred over mortgage creditors for payment out of the net income.[1] And in another case it is held that statutory liens are entitled to payment out of the proceeds of the sale of the mortgaged property before anything can be paid to the bondholders.[2] Creditors entitled to statutory liens under the laws of a State may present their claims and have their liens enforced in a federal court, whose receiver is in possession of the property, with the same effect as if they proceeded in the courts of the State; and creditors whose demands arose in another State, and which constitute equitable liens against the property, may proceed in the same way.[3] A statutory provision, such as exists in North Carolina,[4] that corporations shall not, by mortgage, exempt their property or earnings from execution to satisfy a judgment rendered for labor or materials, will be held not to raise a lien

in favor of materials supplied from a foreign State, where the individual credit of the corporation was alone relied on and a negotiable security taken.[5] When conflicting liens are asserted by different parties, those claiming equitable liens should not be heard before the final hearing.[6]

1 Poland v. Lomoille Valley R. R. Co. 52 Vt. 144; Beach on Receivers, § 373.

2 Blair v. St. Louis etc. R. R. Co. 25 Fed. Rep. 232.

3 Blair v. St. Louis etc. R. R. Co. 19 Fed. Rep. 861; Beach on Receivers, § 373.

4 N. C. Code, § 1255.

5 Traders' National Bank v. Lawrence Manuf. Co. 96 N. C. 293.

6 Receivers etc. v. Wortendyke, 27 N. J. Eq. 658; Beach on Receivers, § 373.

§ 676. Statutory liens in favor of laborers and mechanics.—A statute in New York creates a lien in favor of any person performing any labor for a railroad corporation, upon his filing notice within thirty days after the completion of his labor, with the county clerk of any county through which the road may pass.[1] The statute provides for the form of the notice, its entry by the clerk in a "lien docket," and the payment of a fee of ten cents,[2] for enforcement of the claim by suit, and for the production of evidence of the value of the services rendered, and for the manner of discharging the lien.[3] The liens so created continue for one year, and are to be discharged in the order in which the respective notices were filed.[4] They constitute a charge upon the track, rolling-stock and appurtenances of the railway, and upon the land upon which the track and appurtenances are situated, to the extent of the right, title and interest of the company at the time of the filing of notice.[5] An-

bridges and trestle-work, and other structures connected therewith, for labor performed in constructing the same, and materials furnished therefor, upon notice filed within ninety days thereafter.[6] Similar statutes are found in many other States. Salaries of officers of a railroad company are not classed as wages to employees, and have been refused preference.[7]

1 N. Y. Laws of 1875, ch. 392, §§ 1 and 2.
2 N. Y. Laws of 1875, ch. 392, § 2.
3 N. Y. Laws of 1875, ch. 392, §§ 3, 4 and 5.
4 N. Y. Laws of 1875, ch. 392, §§ 5 and 6.
5 N. Y. Laws of 1875, ch. 392, § 1.
6 N. Y. Laws of 1870, ch. 529, § 1.
7 Addison v. Lewis, 75 Va. 701. The matter of priority of counsel fees for services rendered before the receivership was considered in Bayliss v. Lafayette R. R. Co. 9 Biss. 90; Beach on Receivers, § 363.

§ 677. **Of debts due the State.**—Where a statute gives the State a lien upon a railway, to secure certain indebtedness resulting from the issue of the bonds of the State to it, and the statute also authorizes the company to mortgage its road for a like amount to trustees to pay the State, the State cannot be compelled to give up its lien until all its liabilities on account of the road secured thereby have been discharged.[1] But in Maryland it has been held that a statute authorizing the company to borrow money and to mortgage its property to secure the debt, confers upon the mortgagees a lien superior to that of the State.[2]

1 Ralston v. Crittenden, 3 McCrary, 332.
2 Brown v. State, 62 Md. 439, construing Md. Acts of 1836, ch. 298.

§ 678. **Of the lien of vendors of land.**—A vendor of land to a railway company has, independently of statute, a lien paramount to the mortgagees in

such cases as he would have priority against lands sold to a natural person.[1] But the cases involving this question will be generally decided by the court according to the particular circumstances of each, the acts of the vendor constituting an important factor in the determination.[2] In a late action against a railroad company to foreclose a mortgage, it appeared that plaintiff's intestate sold defendant a certain railway as unincumbered when there was a right of way still unacquired. The evidence showed that the directors of the defendant company knew that all the rights of way had not been paid for, and that there were small claims that the intestate had been unable to settle, and that the line had been operated for ten years, and no action for the land over which it ran, or for damages, had ever been brought. It was held that a judgment for plaintiff for the full amount of his claim was proper.[3]

1 Florida v. Anderson, 91 U. S. 667; Anderson v. Pensacola etc. R. R Co. 2 Woods, 628.

2 Carpenter v. Black Hawk etc. Co. 65 N. Y. 43; Fisk v. Potter, 2 Abb. App. Dec. 138; *Pierce v. Milwaukee etc. R. R. Co.* 24 Wis. 551; 1 Am. Rep. 203.

3 Texas etc. R'y Co. v. Gentry, 69 Tex. 625.

§ 679. Of debts incurred for completing an unfinished line.—In several instances courts have authorized receivers to complete unfinished roads, to construct bridges, and make other permanent improvements, when the best interests of all concerned clearly made such action necessary, and have given the debts incurred thereby priority over the incumbrances. Thus, a receiver has been em-

greatly enhancing the value of the property in his hands and increasing its revenues; and the court refused to hear objections to the expenditure so incurred, when the parties applying had remained silent for more than two years.[1] A federal court has authorized a receiver to complete an unfinished road, in order to prevent the lapse of a land grant;[2] and another directed its officer to complete an additional line and a bridge as a part of the main line, the expense to be paid out of the income, with priority over the mortgage indebtedness.[3]

1 Gibert v. Washington City etc. R'y Co. 33 Gratt. 586. As to the course when the order authorizing the construction of an extension out of the surplus income reserves a lien upon such extension to material men, see Hand v. Savannah etc. R. R. Co. 17 S. C. 219; Beach on Receivers, § 368.

2 Kennedy v. St. Paul etc. R. R. Co. 2 Dill. 448; S. C. 5 Dill. 519.

3 Miltenberger v. Logansport R. R. Co. 106 U. S. 286; Barton v. Barbour, 104 U. S. 123. See, also, RECEIVER'S CERTIFICATES, *infra*, and Beach on Receivers, § 368.

§ 680. Of rentals of leased lines.— Car-trust leases—Rolling-stock, etc.—It is settled that the receiver may be ordered to pay out of the income, and as one of the expenses of operating the road, the rentals due for a line leased by the company whose property he has in his possession and which he is authorized to operate;[1] and if a receiver uses such a leased line with the full knowledge and consent of the bondholders, the payment of a fair rental for the use of such line, and also payment for supplies and materials used in its operation, may be enforced out of the proceeds of foreclosure, before distribution among the bondholders.[2] In the same manner, when the company has possession of rolling-stock under a conditional sale, the title not

stipulated payments—commonly called car-trust leases[2]—the vendor's title and lien will not be affected by the appointment of a receiver, who can acquire no greater title to the particular property than was owned by the company itself. The remaining payments, in case the rolling-stock is used by the receiver and not surrendered to the vendor, or a reasonable compensation for its use, may be ordered to be paid out of the receiver's earnings.[4] The orders giving priority to such claims have, in some cases, directed that, in case of deficiency in the net earnings account, they be paid out of the proceeds of the sale under foreclosure.[5] In New Jersey it has been held that the lessors in car-trust leases were not entitled to payment in full of the rent reserved in the lease, at the hands of the receivers, unless the court should find that such payment was for the best interests of the trust.[6] If rolling-stock thus held by the receiver and used by him is sold under the decree of foreclosure, the owner will be entitled to payment out of the proceeds of the sale.[7] One who purchases at the foreclosure sale rolling-stock which had been bought by the receiver with the earnings of the road, is entitled to it as against mortgagees claiming under a mortgage which was to cover after-acquired property.[8] If a receiver's income is sufficient to pay for additional rolling stock necessary to the operation of the road, he will not be permitted to create a car-trust to procure it for the purpose of enabling him to apply the current income to interest upon bonded indebtedness.[9]

1 Woodruff v. Erie R'y Co. 93 N. Y. 609.
2 Miltenberger v. Logansport R. R. Co. 106 U. S. 286.
3 See the paper on "Car-Trust Securities," by Francis Rawle, Esq., of

the Philadelphia Bar, read before the American Bar Association, at Saratoga, in 1885.

4 *Fosdick v. Schall*, 99 U. S. 235; Myer v. Car Co. 102 U. S. 1; Coe v. New Jersey Midland R. R. Co. 27 N. J. Eq. 37.

5 Miltenberger v. Logansport R. R. Co. 106 U. S. 286. In *Fosdick v. Schall*, 99 U. S. 235, it was said, in effect, that whether such an order should be made would depend largely upon whether there has been a diversion of the receiver's income from his expenses.

6 Coe v. New Jersey Midland R. R. Co. 27 N. J. Eq. 37.

7 Fosdick v. Car Co. 99 U. S. 256.

8 Strang v. Montgomery etc. R. R. Co. 3 Woods, 613.

9 Taylor v. Philadelphia etc. R. R. Co. 9 Fed. Rep. 1.

§ 681. Of the liens of judgment creditors.— If creditors having judgments are entitled to be paid out of the funds of the railroad, or out of claims due to it, they may be paid in full out of the receiver's income in preference to mortgage bondholders, if such funds and debts have been appropriated by the receiver.[1] But when the judgment is obtained against the receiver for materials furnished during the receivership, or if the cause of action arose out of his acts in operating and managing the road, the court may order it to be paid out of the earnings, or, if necessary, out of the proceeds of the foreclosure, since the right to priority depends not so much upon the fact that judgment has been obtained as upon the character of the claim.[2] The general unsecured creditors of the company, however, do not acquire any priority over mortgagees by reducing their claims to judgment,[3] except, of course, where they have done so before the mortgage was executed;[4] and judgment creditors may be enjoined from levying execution upon property covered by the mortgage.[5] Even though a mortgage has not been recorded, judgment creditors having actual notice thereof have no priority over the mortgagees.[6] But the hold-

ers of overdue railroad bonds, secured by mortgages on the railroad, are not entitled to the net earnings of the road in the hands of a receiver, appointed in a suit by a judgment creditor for the protection of his interests, when they have made no demand therefor under the provisions of their mortgages, even although in his suit the creditor, by the words of his bill, seeks relief subject to their right.[7]

1 Gibert v. Washington City etc. R. R. Co. 2 Woods, 519; Beach on Receivers, § 374.

2 Turner v. Indianapolis etc. R. R. 8 Biss, 527; Beach on Receivers, § 374.

3 Legg v. Matthieson, 2 Giff. 71; 2 Hodges on Railways (7th ed.), 125.

4 Bergen v. Porpoise etc. Co. 41 N. J. Eq. 238.

5 Gardner v. London etc. R'y Co. Law R. 2 Ch. App. 201.

6 Butler v. Rahn, 46 Md. 541.

7 Sage v. Memphis etc. R. R. Co. 125 U. S. 361.

§ 682. **Of claims for damages, breach of contract, etc.**—It has been decided by the Supreme Court of the United States that damages for goods lost and for property injured in transportation over a road which is being operated and managed by a receiver, constitute a proper charge upon the earnings of the road, in preference to the claims of bondholders.[1] So, also, it has been held that passengers over a railroad, and an employee of the company, when entitled to damages for injuries received while the railroad is operated by a receiver, should be paid out of the fund in court realized from the earnings of the road during the receivership, in preference to mortgage or other debts existing at the time the action was brought.[2] But claims for damages originating prior to the foreclosure proceedings and appointment of the receiver, cannot be

made the basis of a suit and judgment taking precedence of the mortgage bondholders,[3] unless it is so provided by the order of the court placing the road in the possession of the receivers.[4] Thus, in a late case it was held that a claim for damages brought by the owner of a sawmill against a railway company, for breach of a contract in relation to the shipment of lumber, which the company, before the foreclosure suit was brought, had agreed to take in certain quantities at a point where it did not usually receive freight, could not be paid out of the earnings of the road in preference to the right of mortgage bondholders.[5]

1 *Cowdrey v. Galveston etc. R. R. Co.* 93 U. S. 352.

2 Ex parte Brown, 15 S. C. 518; Klein v. Jewett, 26 N. J. Eq. 474; Beach on Receivers, § 371.

3 Central Trust Co. v. Wabash etc. R'y Co. 32 Fed. Rep. 566; S. C. 28 Fed. Rep. 871.

4 Davenport v. Receivers A. & C. R. R. Co. 2 Woods, 519. See, also, Hopkins v. Colman, 2 Tenn. Ch. 323.

5 Central Trust Co. v. Wabash etc. R'y Co. 32 Fed. Rep. 566.

§ 683. The distinction between first charges upon income and prior liens upon the corpus. The rule charging operating expenses of a railroad, debts due from it to connecting lines growing out of an interchange of business, debts due for the occupation of leased lines, and, generally, debts created under special circumstances which make an equity in favor of the unsecured debtor, upon the gross income of the road before a fund arises for the payment of mortgage interest, is not applicable to a fund realized from a sale of the road under foreclosure of a mortgage; and, as a general rule, unsecured debts of the company cannot, in such case, take precedence over debts secured by prior and express liens, in the distribution of the proceeds of

the sale of the mortgaged property.[1] In the absence of an express and definite contract between a railway company and a construction company employed to build the road, conferring upon the latter a prior lien upon the railway, it is held that it cannot lay claim to any priority over the liens of other creditors, least of all where it had knowledge of their existence.[2] There are cases, however, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation, otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the property, those who are secured by prior mortgage liens. The rule is, that if current earnings are used for the benefit of mortgage creditors before the current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.[3] Thus, where the mortgaged rolling-stock of a railroad is in peril of seizure under a judgment, and the railroad, claiming the judgment to be wrongful, obtains an injunction against that seizure, one who becomes surety on the injunction bond, the injunction having been dissolved and judgment recovered against him, has an equity to be paid out of the property of the railroad sold to the mortgagees at the foreclosure sale, especially when they have purchased expressly subject to intervening claims that may be declared paramount, where the receiver has used earnings to increase the *corpus* of the estate, and where the surety has shown an intention to look to the company's property as well as its

personal security by taking chattel mortgages on certain locomotives.[4] But rent due for a leased line as a part of the operating expenses, is not entitled to be paid out of the proceeds of a foreclosure sale in preference to the claims of the mortgage bondholders, in the absence of evidence showing that the bondholders have been benefited by the default in the payment of the rent.[5]

1 St. Louis etc. R. R. Co. v. Cleveland etc. R'y Co. 125 U. S. 658.

2 Wright v. Kentucky etc. R. R. Co. 117 U. S. 72.

3 St. Louis etc. R. R. Co. v. Cleveland etc. R'y Co. 125 U. S. 653, 673; Union Trust Co. v. Morrison, 125 U. S. 591, 612; Sage v. Memphis etc. R. R. Co. 125 U. S. 331; Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434; *Burnham v. Bowen*, 111 U. S. 776, 783; Union Trust Co. v. Souther, 107 U. S. 591; Miltenberger v. Logansport R'y Co. 106 U. S. 286; *Fosdick v. Schall*, 99 U. S. 235; Menasha v. Milwaukee etc. R. R. Co. 52 Wis. 414. See, also, Duncan v. Mobile etc. R. R. Co. 2 Woods, 542; Hale v. Burlington etc. R. R. Co. 1 McCrary, 58.

4 Union Trust Co. v. Morrison, 125 U. S. 591.

5 St. Louis etc. R. R. Co. v. Cleveland etc. R'y Co. 125 U. S. 658.

§ 684. Cases in which priority has been refused.—Courts have refused to grant priority of payment to persons having claims for money lent to a railroad company,[1] contractors' claims for construction,[2] and for advances made to complete the construction of a road when such advances were not made at the request of bondholders or upon their promise.[3] It has also been held that damages caused by fire ignited by sparks from a locomotive, are not included within the operating expenses which have been allowed priority of payment.[4]

1 Addison v. Lewis, 75 Va. 702.

2 In re Kelly, 4 Fed. Rep. 846; S. C. 10 Biss. 151.

3 Hiles v. Case, 14 Fed. Rep. 141.

4 *Fosdick v. Schall*, 99 U. S. 235. See, also, Gilman v. Illinois etc. Tel. Co. 91 U. S. 603; American Bridge Co. v. Heidelbach, 94 U. S. 798; *Galves-*

be paid, while out of possession, "is the net income obtained by deduct ing from the gross earnings what is required for necessary operating and managing expenses, proper equipments and useful improvements" As t whether interest should be allowed upon claims which have been given priority over mortgage indebtedness, etc., see Ex parte Brown, 18 S. C. 87

§ 685. Of advancements to pay preferred claims—No right of subrogation.—Persons lending money to a railway company to enable it to pay debts, which, if remaining unpaid, would be a lien upon the income or the *corpus* of the property superior to the mortgage bondholders, are not entitled, upon foreclosure, to be subrogated to the shoes of those preferred creditors whose claims the company was thus enabled to pay,[1] unless it can be shown that the moneys so advanced were used by the company in a manner directly beneficial to the bondholders.[2] Thus, one who pays a judgment against a railroad company a few weeks before the appointment of a receiver. under an agreement that the advancement shall be repaid by the company, is not entitled to priority over bondholders.[3] And a person who, at the request of the bondholders, pays a debt of a railroad company, due for construction, cannot claim a superior equity to theirs, unless he can prove inducements and dealings of such a character as to estop them from asserting their liens as superior to his claim.[4] Nor can the benefit of statutory liens in favor of certain classes of creditors be transferred by the company to persons from whom it borrows money to pay these preferred claims.[5] But the provision of the Mississippi code that no mortgage of the income, future earnings, or rolling-stock shall be valid against debts contracted in carrying on the

corporations advancing money to another company with which they had an operating arrangement, to enable the latter to pay its taxes, the wages of employees, and balances due the former companies.[6] In a recent case it was held that where trustees under a trust deed given to secure railroad bondholders, which contains covenants of title, are obliged to pay off a pre-existing incumbrance held by the State, in order to save the road from a judgment sale, they are entitled, upon such payment, to be subrogated to the rights of the State, and to indemnify themselves from the property of the company.[7] A provision in a railroad mortgage for the expenditure of money received from the sale of part of the property not covered by the mortgage, is not complied with by the expenditure of other money before the receipt of the purchase-money of the property sold, unless it was expended under circumstances such as to connect the antecedent expenditure and the proceeds of the sale together in such a way as to show that the expenditure was made with the expectation of reimbursement therefrom, and in reliance upon the receipt thereof.[8]

1 Penn v. Calhoun, 121 U. S. 251; *Fosdick v. Schall*, 99 U. S. 255; Blair v. St. Louis etc. R'y Co. 23 Fed. Rep. 521; Kelly v. Green Bay etc. R. R. Co. 10 Biss. 151; Receivers of New Jersey Midland R. R. Co. v. Wortendyke, 27 N. J. Eq. 658; Cairo etc. R. R. Co. v. Fackney, 78 Ill. 116. But see Farmers' Loan & Trust Co. v. Vicksburg etc. R. R. Co. 33 Fed. Rep. 778.

2 Penn v. Calhoun, 121 U. S. 251; *Fosdick v. Schall*, 99 U. S. 255.

3 Blair v. St. Louis etc. R'y Co. 23 Fed. Rep. 521.

4 Kelly v. Green Bay etc. R. R. Co. 10 Biss. 151.

5 Cairo etc. R. R. Co. v. Fackney, 78 Ill. 116. These liens, if transferable at all, can only be transferred by those for whose benefit they are created.

6 Farmers' Loan & Trust Co. v. Vicksburg etc. R. R. Co. 33 Fed. Rep. 778, construing Miss. Code, § 1033.

7 [illegible] R. R. Co. v. Penn, 124 U. S. 659.

§ 686. **Of the decree of sale—Provision for purchase by bondholders.**—A decree in foreclosure proceedings is a judgment *in rem* and not *in personam;* accordingly, execution will not issue thereon against property not covered by the mortgage, where the mortgaged property is insufficient to pay the whole amount for which it was given as security;[1] and bondholders cannot treat the president of a railway who bought in the property at foreclosure sale, as a trustee for them, when they had an opportunity to purchase the same and neglected to do so.[2] Any difficulty, however, with respect to the inadequacy of the security is usually obviated by permission being granted the bondholders by the court to buy in the property and to pay for it with their bonds.[3] And the court may decree that any person other than the mortgage trustee, who shall purchase the property at the sale, shall make an immediate payment in cash of a part of his bid, by way of earnest.[4] In New York there is a statute authorizing any mortgagee of any railroad and the franchise thereof, to become the purchaser of the same at any sale thereof under the mortgage, upon foreclosure by advertisement, or under a judgment or decree, or otherwise, and to hold and convey the same with all the rights and privileges belonging thereto.[5] The decree in foreclosure proceedings, in which a railway is to be sold, should name an upset price sufficiently large to cover costs, all allowances made by the court, receiver's certificates and interest, liens prior to the bonds, amounts diverted from the earnings, and all undetermined claims which will be settled before the confirmation and sale.[6] But where a mortgage

of a railroad contained a covenant that the trustee named therein should, at a request of a majority of the bondholders, purchase the premises at a sale thereunder, for the benefit of the bondholders, and organize a new company, it was not error to decree, on a foreclosure of the mortgage, that the trustee should be authorized and directed to bid at the sale, as trustee for first mortgage bondholders, at least the amount of the principal and interest of the first mortgage bonds.[7] In the case last cited it was held proper to make a decree of sale subject to the rights and equities of parties to the suit under liens or judgments claimed by them, and to reserve those rights for further adjudication.[8] Upon foreclosure by a trustee for bondholders, the bonds of one of whom have been fully guarantied by the others, the court errs in directing the trustee to bid in the property for the amount in full of all the bonds, the holder of the guaranteed bonds objecting thereto.[9] A foreclosure of all of several mortgages on railroad property, and a sale of the property entire, will not be ordered by one decree of the court.[10]

1 Welsh v. St. Paul etc. R. R. Co. 25 Minn. 314.

2 Credit Co. v. Arkansas R. R. Co. 15 Fed. Rep. 46.

3 *Ketchum v. Duncan*, 96 U. S. 659; Kropholler v. St. Paul etc. R. R. Co. 1 McCrary, 301; S. C. 2 Fed. Rep. 304.

4 Sage v. Central R. R. Co. 99 U. S. 334.

5 N. Y. Laws of 1857, ch. 444, § 1.

6 Blair v. St. Louis etc. R. R. Co. 25 Fed. Rep. 232.

7 Sage v. Central R. R. Co. 99 U. S. 334.

8 Sage v. Central R. R. Co. 99 U. S. 334.

9 Sauxey v. Iowa City Glass Co. 63 Iowa, 707.

10 Wabash etc. R'y Co. v. Central Trust Co. 22 Fed. Rep. 138.

§ 687. The decree conclusive upon all parties

closure proceedings by a court having general jurisdiction of the parties and the subject-matter, import absolute verity, binding upon all the parties, none of whom can thereafter be heard to plead collaterally that the decision was not founded upon sufficient evidence.[1] The only remedy of a party aggrieved by the judgment, is by appeal therefrom, or by a motion in the action in which it was rendered.[2] Accordingly, a decree is final as between the parties with respect to the questions thereby decided, or which might have been brought up in the suit, and those matters cannot be again brought in issue between the same parties, unless it appear that the successful party has wrongfully prevented the other party from presenting his case fully.[3] The decree, however, is not conclusive against parties having no notice of the proceedings.[4] A decree entered by consent of the parties is binding only within the scope of the bill.[5] The decision in an action upon coupons is not conclusive upon the parties in a subsequent suit upon other coupons of the same bond, unless the issues in the former action embraced all the issues in the latter.[6]

1 *Herring v. New York etc. R. R. Co.* 105 N. Y. 341, 371, 372; citing Grignosis v. Astor, 2 How. 319.

2 *Herring v. New York etc. R. R. Co.* 105 N. Y. 341, 372.

3 Brooks v. O Hara Bros. 2 McCrary, 644; Aurora City v. West, 7 Wall, 82, 102; Woods v. Pittsburgh etc. R. R. Co. 99 Pa. St. 101; Wood's Railway Law, 1636; 2 Taylor on Evidence, § 1513.

4 Pittsburgh etc. R. R. Co. v. Marshall, 85 Pa. St. 187.

5 Vermont etc. R. R. Co. v. Vermont Central R. R. Co. 50 Vt. 500.

6 Town of Enfield v. Jordan, 119 U. S. 680.

§ 688. Of the foreclosure sale.—Unless so pro-

acquisition of the corporate property carry with it, to the purchaser, any debts which may be owing by the company,[1] unless they be imposed upon him by statute, as a condition precedent to the right to operate the railway under a special charter.[2] Neither, on the other hand, does the purchaser at foreclosure sale thereby assume the liabilities of the company upon contracts and torts.[3] When, pending foreclosure proceedings, the property of a railway company is becoming every day more heavily incumbered by receiver's certificates, the court will not postpone the sale upon the objection of a minority of second mortgage bondholders, urged upon the ground that the non-settlement of the conflicting claims of different classes of bondholders, at the time of the sale, would seriously depreciate the salable value of the property, but will leave the conflicting rights to be settled after the sale.[4] Where a system of railway property is divided, with respect to ownership and the interests involved, into several parcels, the decree may direct that each part be offered separately for sale, then that bids be received for the whole; and that if more be bid for the property in its entirety, it shall be sold as a whole; and that the proceeds be then divided among the several parties in proportion to the bids upon the separate parts in which they are severally interested. Under such a mode of procedure, all parties have substantially the benefit of separate sales, without the loss which might be occasioned by a division of the railway.[5] A decree of sale is to be carried out by the proper officer of the court; but it is with the mortgage trustees to elect whether the sale

shall be made or not, and to choose the time therefor. The trustees will not be compelled by *mandamus* to have the property sold.[6]

1 Wright v. Milwaukee etc. R. R. Co. 25 Wis. 46.

2 St. Louis etc. R. R. Co. v. Miller, 43 Ill. 199.

3 Secombe v. Milwaukee etc. R. R. Co. 2 Dill. 469; Hopkins v. St. Paul etc. R. R. Co. 2 Dill. 396; *Metz v. Buffalo etc. R. R. Co.* 58 N. Y. 61; 17 Am. Rep. 201; Wellsborough etc. Plank Road Co. v. Griffin, 47 Pa. St. 417.

4 First National Bank v. Shedd, 121 U. S. 74.

5 Union Trust Co. v. Illinois Midland etc. R. R. Co. 117 U. S. 434.

6 Farmers' Loan and Trust Co. v. Central R. R. Co. 4 Dill. 533.

§ 689. **Of the purchaser's title.**—The purchasers of a railway property sold under foreclosure take the same right to operate the road that the company itself possessed, but they do not thereby acquire the franchise of corporate existence.[1] Neither do the purchasers thereby assume liability upon the contracts nor for the torts of the company.[2] They acquire such title to the property as was vested in the parties to the suit in which the decree of sale was rendered,[3] subject only to prior liens and incumbrances.[4] Where, by the express terms of the decree of sale, a purchaser took the property subject to the liens already established, or which might, on pending references, be established as prior and superior to the liens of the first mortgage bondholders, he cannot, so long as he keeps the property, relitigate the liens expressly subject to which he bought and took the title, or be relieved from his obligation to comply with the terms of the purchase.[5] When the representatives of a committee appointed to purchase a railway which was to be sold under foreclosure consented

was to acquire a lien upon the road, and the committee had notice of the arrangement and permitted the performance of the conditions by the other party, the purchasers themselves were held to be affected with notice of the lien and to take the property subject thereto.[6]

1 Atkinson v. Marietta etc. R. R. Co. 15 Ohio St. 21; Bruffet v. Great Western R. R. Co. 25 Ill. 353. *Vide infra*, chapter on REORGANIZATION.

2 *Vide infra*, REORGANIZATION.

3 Beach on Receivers, § 734. Vide *infra*, REORGANIZATION.

4 *Vide infra*, REORGANIZATION.

5 Swann v. Wright, 110 U. S. 590, per HARLAN, J. See further, Williams v. Morgan, 111 U. S. 697.

6 Vilas v. Page, 106 N. Y. 439.

§ 690. **Of the distribution of the proceeds of sale among the bondholders.**—The proceeds of the foreclosure sale are to be divided among the bondholders in proportion to the face value of the bonds held by each, without regard to the amount which he may have paid for them.[1] Where, however, a person holds bonds merely as collateral for a debt due him from the corporation, he is entitled to receive in the distribution only the amount of his debt.[2] Where the proceeds of a foreclosure sale upon a mortgage which is security for a series of bonds, are insufficient to pay the full amount due, each bond carries only a fractional interest in the proceeds, to be ascertained by the proportion which its face value bears to the whole amount of the series.[3] And the proportionate share of one bondholder in the proceeds of the mortgaged property is not increased by the fact that other holders of the same series have surrendered their bonds under a

the intent of extinguishing the debt of which they are the evidence, thereby diminishing the number of bonds in the series.[4] For, where its own bonds have been purchased by a corporation or acquired by it under a funding scheme, unless they be destroyed by it with intent to extinguish the lien, there is no doubt of its right as against other bondholders secured by the same mortgage, to reissue them before maturity, if the organic law of the corporation does not prohibit the exercise of that power.[5] Where a railroad mortgage to secure bondholders was foreclosed, and the sum realized thereon being insufficient to pay in full all the bonds, a *pro rata* distribution among such as had proved their claims was directed by the court, which was accordingly done as to some of the bondholders, but before all received their proportions others came in, it was held that the latter were not entitled to the same proportion in the undisposed-of balance, and that the whole account should be recast at a lower rate.[6]

1 Duncomb v. New York etc. R. R. Co. 84 N. Y. 190, where bonds to the amount of $810,000 had been issued to secure advances of only $81,000. And in this case it was held immaterial that the bonds were given for an antecedent debt. But see Rice's Appeal, 79 Pa. St. 168; Jessup v. City Bank, 14 Wis. 331; Ackerson v. Ladi Branch R. R. Co. 23 N. J. Eq. 542.

2 Jessup v. City Bank, 14 Wis. 331.

3 *Barry v. Missouri, Kansas & Texas R'y Co.* 34 Fed. Rep. 829; S. C. 4 R'y & Corp. Law J. 193, 200, citing Hodges' Appeal, 84 Pa. St. 359.

4 *Barry v. Missouri, Kansas & Texas R'y Co.* 34 Fed. Rep. 829; S. C. 4 R'y & Corp. Law J. 198, 200, citing Brinkerhoff v. Lansing, 4 Johns. Ch. 65; Pomroy v. Rice, 16 Pick. 22; Watkins v. Hill, 8 Pick. 522; Dana v. Binney, 7 Vt. 501. That is, the holder of one bond of a series of 2,000 is entitled to one 2000th part of the proceeds of the mortgaged property; and when 1,999 bonds have been surrendered under a refunding scheme to which the former holder dissents, he is not entitled, upon an accounting, to receive the full amount of his bond and accrued interest before the holders of the 1,999 bonds receive anything; but having dissented to the arrangement, his right remain entirely unaffected thereby, and he is entitled as before to only one 2,000th part of the proceeds.

5 *Barry v. Missouri, Kansas & Texas R'y Co.* 34 Fed. Rep. 829; S. C.

4 R'y & Corp. Law J. 198, 200, citing *Claflin v. Railroad Co.* 4 Hughes (S. C.), 12.

6 Pinkard v. Allen 75 Ala. 73.

§ 691. No priority as between the holders of bonds and coupons secured by the same mortgage. All the bonds secured by a mortgage are deemed to have been issued at the same time, and there is no priority in favor of the holders of the bonds bearing the lower numbers.[1] Indeed, unless so required by statute, it is not even necessary that the bonds of a series should be numbered at all; and a change in the numbering does not vitiate a bond.[2] In England, it is enacted that the respective obligees in mortgage bonds shall, proportionally, according to the amount of the moneys secured thereby, be entitled to be paid out of the tolls, or other property or effects of the company, the respective sums in such bonds mentioned, and thereby intended to be secured, without any preference one above another by reason of priority of date of any such bond, or of the meeting at which the same was authorized, or otherwise, howsoever.[3] The priority of bonds secured by a first mortgage, over those secured by a second mortgage, is not impaired by the fact that the latter were issued before the former.[4] Coupons are entitled to no priority over the bonds themselves, nor are coupons maturing at an earlier date entitled to priority over those maturing later.[5]

1 Stanton v. Alabama etc. R. R. Co. 2 Woods, 523.

2 Birdsall v. Russell, 29 N. Y. 220; *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491; *Commonwealth v. Emigrant Savings Bank*, 98 Mass. 12; 93 Am. Dec. 126.

3 8 Vict. ch. 16, § 44.

4 *Claflin v. South Carolina R. R. Co.* 4 Hughes (S. C.), 12.

5 *Ketchum v. Duncan*, 96 U. S. 659.

§ 692. **Vacation of decree.**—A decree in foreclosure proceedings will not be vacated except at the suit of a party in interest who is able to show good and sufficient reasons therefor.[1] Fraud or some unfairness must be clearly proven,[2] and the parties seeking to have the proceedings set aside should act with reasonable promptness.[3] Bondholders who, with notice of the facts, have approved a plan of reorganization, cannot in the absence of fraud have the proceedings set aside.[4] In a late case, the holders of bonds secured by underlying mortgage were represented by their trustees, and a decree foreclosing the general mortgage, and ordering a sale, was entered without objection. The entire property was sold pursuant to the decree, and the purchasers agreed to pay all preferred debts before receiving possession, and the contract of sale was partially executed. It was held that it was too late, after such decree and sale, for holders of underlying mortgage bonds to object to the manner in which the earnings of the system had been applied prior to the decree, and to proceedings to foreclose their mortgages, and too late for the court so to alter the decree as to change the rights of the purchasers.[5]

1 Graham v. Boston etc. R. R. Co. 118 U. S. 161; Ward v. Montclair R. R. Co. 26 N. J. Eq. 260. *Cf. Fayolle v. Texas etc. R. R. Co.* (D. C.) 3 Am. & Eng. R. R. Cas. 532.

2 Graham v. Boston etc. R. R. Co. 118 U. S. 161; Leavenworth County v. Chicago etc. R'y Co. 25 Fed. Rep. 219; Matthews v. Murchison, 15 Fed. Rep. 691.

3 Graham v. Boston etc. R. R. Co. 118 U. S. 161.

4 Matthews v. Murchison, 15 Fed. Rep. 691.

5 Central Trust Co. v. Wabash etc. R. R. Co. 30 Fed. Rep. 332.

§ 693. **The same subject.**

property has increased in value.[1] Neither is the decree to be vacated because the directors of the company corruptly suffered the judgment to be taken by default, the trustees of the bondholders having knowledge thereof, unless it can be shown that there was actual collusion between them.[2] But a decree made by consent of parties may be set aside at any time before it has been executed.[3] After it has been carried into effect, however, the court has no power to change it.[4] Bondholders seeking to have a foreclosure sale set aside, should institute proceedings through their mortgage trustees, and the court will not ordinarily entertain a bill for that purpose filed by a single bondholder.[5] A denial of the petition of shareholders to be made parties to the foreclosure suit, is no bar to an action by them to vacate the decree on the ground of fraud.[6] The mortgage trustees are necessary parties to a suit brought by stockholders to set aside the foreclosure.[7] An action to vacate a decree of foreclosure and sale is not a continuance of the original foreclosure proceedings to the extent of authorizing the service of subpœnas upon persons beyond the territorial jurisdiction of the court.[8] When a decree in foreclosure proceedings is vacated on the ground of fraud, the complainant is entitled to be placed in the position which he would have otherwise occupied.[9]

1 Leavenworth County v. Chicago etc. R'y Co. 25 Fed. Rep. 219.

2 *Harpending v. Munson*, 91 N. Y. 880; S. C. 12 Am. & Eng. R. R. Cas. 408.

3 Union Bank v. Marin, 3 La. An. 54; Vermont etc. R. R. Co. v. Vermont Central R. R. Co. 50 Vt. 500.

4 Wadhams v. Gay, 73 Ill. 415.

5 Meyer v. Utah etc. R. R. Co. 3 Utah, 280.

6 Tazewell County v. Farmers' Loan & Trust Co. 12 Fed. Rep. 782.

7 Ribon v. Chicago etc. R. R. Co. 16 Wall. 446.

8 Wood's Railway Law, 1638, citing Pacific R. R. Co. v. Missouri Pacific R. R. Co. 3 Fed. Rep. 772.

9 Osborn v. Michigan etc. R. R. Co. 2 Flip. 503.

§ 694. **Redemption.**—While mortgage trustees are in possession of a railway, operating it for the benefit of the bondholders,[1] or at any time before the foreclosure sale has been confirmed, a suit to redeem the property may be brought.[2] But after a valid sale has been confirmed by the court the right of redemption is lost.[3] The only remedy, if any, is by suit to vacate the decree.[4] In several States, however, the right of redemption is regulated by statute, and provision is made for arresting proceedings at any time before the decree or before actual sale, if the amount due, with interest and costs, is brought into court or paid to the officer or to the mortgagee.[5] In Massachusetts and Minnesota, redemption may be made in the same way before entry for conditions broken; and upon the refusal of the tender, the mortgagor may, within one year, bring a suit in equity to redeem the property.[6] In New York, there is a statute authorizing any stockholder in a railway corporation to make a payment upon a mortgage in process of foreclosure and thereupon to become interested in and to be protected by the mortgage.[7] And after the foreclosure sale, any stockholder may, by making a similar payment within six months, acquire an interest in the company organized by the purchasers.[8] The legislation of Illinois, giving the right to redeem mortgaged lands sold under decree, does not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and personal property. Its real estate, per-

sonalty, and franchises so mortgaged should be sold as an entirety, and without right of redemption given by statute.[9]

1 Ashuelot R. R. Co. v. Elliott, 57 N. H. 397.

2 *Chicago etc. R. R. Co. v. Fosdick*, 106 U. S. 47; Howell v. Western R. R. Co. 94 U. S. 436.

3 Turner v. Indianapolis etc. R. R. Co. 8 Biss. 330.

4 Delaware etc. R. R. Co. v. Scranton, 34 N. J. Eq. 429.

5 Stimson's Am. Stat. Law (Jan. 1, 1886), § 1941, citing the statutes of Mass., Me., Conn., N. Y. Civ. Code, § 1634-5, N. J., Ind., Mich. Wis. Minn., Neb., Mo., Ark., Oregon, Wash. T., Dak.

6 Stimson's Am. Stat. Law (Jan. 1, 1886), § 1942, citing the statutes of Mass. and Minn.

7 N. Y. Laws of 1853, ch. 502, § 1.

8 N. Y. Laws of 1853, ch. 502, § 2.

9 Hammock v. Farmers' Loan & Trust Co. 105 U. S. 77.

CHAPTER XXVI.

OF THE APPOINTMENT, REMOVAL AND DISCHARGE OF RECEIVERS.

§ 695. Introduction.
§ 696. Appointment upon the application of unsecured creditors.
§ 697. Appointment upon the application of junior mortgagees.
§ 698. Appointment upon the company's own application.
§ 699. Reluctance of the courts in appointing receivers to manage railway property.
§ 700. The adequacy of remedies at law as affecting the appointment of a receiver.
§ 701. Under what circumstances the court will appoint a receiver.
§ 702. (*a*). Of insolvency as a ground for appointing a receiver.
§ 703. (*b*). Of default in payment of interest or principal as a ground for appointing a receiver.
§ 704. (*c*). Of the right to foreclose as a ground for appointing a receiver.
§ 705. (*d*). Of internal corporate disagreements and derangements.
§ 706. (*e*). Of failure to run trains.
§ 707. (*f*). Sundry cases.
§ 708. Of the court which may appoint a receiver.
§ 709. The court first obtaining jurisdiction retains it.
§ 710. The rule as to priority of obtaining jurisdiction.
§ 711. Of the time when a receiver may be appointed.
§ 712. The same subject, continued.
§ 713. The selection of a receiver is in the discretion of the court—Appeal.
§ 714. The same subject, continued—The New York and federal rule.
§ 715. Of eligibility to serve as receiver.
§ 716. Of the receiver's bond.
§ 717. Effect of the appointment upon the rights of litigants and of third parties.
§ 718. Effect of the appointment upon corporate powers—Upon pending litigation.

§ 720. Removal.
§ 721. Discharge.
§ 722. The receiver must be discharged upon payment by the defendant of the amount found to be due.
§ 723. An order by consent vacating an appointment should not make reservations.
§ 724. Disposition of the property upon discharge.

§ 695. Introduction.—A receiver is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit, to take possession of and preserve, *pendente lite*, the fund or property in litigation, when it does not seem equitable to the court that either party should have possession or control of it.[1] Receivers are, as a general rule, mere custodians, having no powers except those conferred by the order of their appointment; but with the growth of equity jurisdiction, it has become usual to clothe them with much larger powers than were formerly conferred. A number of the States of the union have, by statute, conferred enlarged powers upon them for special purposes, the effect being to constitute the officers statutory assignees, having more extensive duties and powers than those of mere custodians, and making them not strictly receivers, though the name is retained.[2] In making an appointment, the court is usually careful to consider only the facts necessary to be taken into account for the purposes of the application, and will not go into the merits of the case generally.[3] The appointment of a receiver will not prevent the running of the statute of limitations. His holding is the holding of the court for him from whom the possession was taken. He is appointed on behalf of all parties, and if any loss arise from deficiency in his accounts, the estate

must bear it.[4] A plaintiff, acting without fraud, is not liable for damages sustained by property while in the hands of a receiver appointed at his instance.[5]

1 Wyatt's Prac. Reg. 335; Chautauque Co. Bank v. White, 6 Barb. 584. With regard to the proceedings to obtain the appointment; of the bill, motion, and answer, and parties to the bill; of the notice, and *ex parte* applications; of affidavits accompanying the application; of reference to a master; of the order of appointment, and of how the order is drawn and entered, see Beach on Receivers, §§ 106-171.

2 Verplanck v. The Mercantile Ins. Co. 2 Paige, 453; Hooper v. Winston, 21 Ill. 353; Grant v. City of Davenport, 18 Iowa, 194; Davis v. Gray, 16 Wall. 219; Yeager v. Wallace, 44 Pa. St. 294; Runyon v. The Farmers' & Mechanics' Bank, 3 Green, 480; Cooney v. Cooney, 65 Barb. 524.

3 Skinners' Co. v. Irish Soc. 1 Mylne & C. 162; Conro v. Gray, 4 How. Pr. 166.

4 Ellicott v. United States Ins. Co. 7 Gill, 307.

5 Kaiser v. Kellar, 21 Iowa, 95; Beach on Receivers, § 1.

§ 696. **Appointment upon the application of unsecured creditors.**—Ordinarily the unsecured creditors of a corporation, even though their claims have been reduced to judgments, cannot secure the appointment of a receiver merely because the company fails or refuses to pay its debts.[1] When ordinary remedies will suffice, creditors will be relegated to them. Where there is another clear and ample remedy open to a complainant, either at law or in equity, the extraordinary proceeding of taking a large property of such a peculiar character as a railway out of the hands of its rightful possessors and placing it under the control of a receiver, as a means of collecting comparatively small debts, will not be countenanced by the courts.[2] But there are special circumstances under which an application by judgment creditors will be granted; as where the company is shown to be insolvent, and there is danger of its wasting its assets.[3] And in a late case, allegations by a judgment creditor of

mortgaged, that, if the plaintiff should attempt to enforce payment of his debt by execution and sale, there would be no bidders at more than a nominal amount, while if the property should be placed in the hands of a receiver and operated by him, there would be an annual surplus from which the plaintiff's judgment might be satisfied, were held sufficient to support the appointment of a receiver.[4] It is not necessary in such a case that he should first sue out an execution, where he deems it useless, and no objection is made to the application for a receiver on the ground of his failure so to do.[5]

1 Sage v. Memphis etc. R. R Co. 125 U. S. 361, per HARLAN, J.; *Milwaukee etc. R. R. Co. v. Soutter*, 2 Wall. 510, 523, per MILLER, J.

2 *Milwaukee etc. R. R. Co. v. Soutter*, 2 Wall. 510, 523, per MILLER, J., where the railway was ninety-five miles in length, and the plaintiff's claim was based upon a judgment for only $16,000.

3 Turnbull v. Prentis Lumber Co. 55 Mich. 387.

4 Sage v. Memphis etc. R. R. Co. 125 U. S. 331, per HARLAN, J.

5 Sage v. Memphis etc. R. R. Co. 125, U. S. 361, per HARLAN, J.

§ 697. Appointment upon the application of junior mortgagees.—A junior mortgagee has a right to a receiver to collect the rents of the mortgaged premises for his benefit, pending a suit to foreclose, brought by a senior mortgagee, to which he is made a party.[1] The common-law rule defining the rights of junior and senior mortgagees, where the first mortgagee is in possession, was early stated by Lord ELDON, as follows:—"If a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, that is, if there is a prior mortgagee, then, if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession; but if he is in

possession, you cannot come here for a receiver; you must redeem him, and then in taking the accounts, he will not be allowed any sums that he may have paid over to the mortgagor after notice of the subsequent incumbrance."[2] So long as anything is due, in one case it was said, if even a sixpence is due, the receiver will be refused,[3] and the question whether anything is due cannot be tried on motion.[4] But it should clearly appear that something is due, and if the accounts of the mortgagee are so incomplete that he cannot determine definitely whether or not anything is due, the court will allow the motion to stand over in order to allow him to find out the amount, and if he fail to show any, the court may assume that nothing is due and act accordingly.[5]

1 Washington etc. Ins. Co. v. Fleischauer, 20 Hun, 117.

2 Berney v. Sewell, 1 Jacob & W. 647. *Acc.* Rowe v. Wood, 2 Jacob & W. 553; Hiles v. Moore, 15 Beav. 175; Codrington v. Parker, 16 Ves. 469; Faulkner v. Daniel, 10 Law J. N. S. Ch. 33; Quinn v. Brittan, 3 Edw. Ch. 314; Bolles v. Duff, 35 How. Pr. 481; Boston & Providence R. R. Co. v. New York & N. E. R. R. Co. 12 R. I. 220; Norway v. Rowe, 19 Ves. 144.

3 Chambers v. Goldwin, cited in 13 Ves. 377. See, also, the cases cited in the preceding note.

4 Rowe v. Woods, 2 Jacob & W. 553; Quinn v. Brittan, 3 Edw. Ch. 314.

5 Codrington v. Parker, 16 Ves. 469.

§ 698. **Appointment upon the company's own application.**—A receiver may be appointed not only upon the application of creditors and others interested in the property, but also upon the application of the corporation itself.[1] This has been done upon the application of a railway company which was a consolidation of a number of corporations created by several States, where it was alleged that the company was insolvent, and that if the lines of road composing it were broken

of various receivers, and the rolling-stock, materials and supplies scattered abroad, the result would be irreparable injury and damage to all persons having any interest in the several lines of road.[2] But the mere insolvency of the corporation is not sufficient ground for the appointment of a receiver at the instance of a stockholder, in the absence of an express statute.[3] Under the Maryland statutes, a stockholder is allowed to file a bill for a receiver only where the insolvency of the corporation has been already established by some independent legal proceedings.[4] And in proceedings, instituted under the New York statute,[5] to bring about the voluntary dissolution of a corporation, the court can appoint a receiver only upon granting the final order for the dissolution of the corporation.[6] No action will lie against an insolvent company seeking an appointment of a receiver, under a statute prohibiting acts impairing the value of its stock.[7]

1 Wabash etc. R'y Co. v. Central Trust Co. 22 Fed. Rep. 272. In a later case, Judge TREAT, referring to the action of the court in this case, defended it, and said that it had received the sanction of the Supreme Court of the United States, but did not state when or where it was given: Central Trust Co. v. Wabash etc. R'y Co. 29 Fed. Rep. 618, 623. See, also, Headly v. Ocean City etc. Assoc. (1887) — N. J. —

2 Wabash etc. R'y Co. v. Central Trust Co. 22 Fed. Rep. 272. It is worthy of notice that the receivers appointed in this case were subsequently superseded by others as to the property in their hands located in Illinois, upon the application of creditors of one of the roads forming the Wabash system holding an older lien, though not on account of the manner in which they were appointed. See Atkins v. Wabash R'y Co. 29 Fed. Rep. 161.

3 Merryman v. Carroll etc. Co. 4 R'y & Corp. Law J. 12.

4 Merryman v. Carroll etc. Co. 4 R'y & Corp. Law J. 12.

5 N. Y. Code Civ. Proc. ch. 17, tit. 11.

6 In re Boyton Saw & File Co. 34 Hun, 369.

7 Headly v. Ocean City etc. Assoc. (1887) — N. J. —

§ 699. Reluctance of the courts in appointing receivers to manage railway property.—The American courts of chancery have frequently

given expression to their reluctance in appointing receivers to manage the property of railway companies. They have always reserved to themselves a broad discretion in granting or refusing applications for an exercise of their power herein, proceeding always with great caution with reference to the circumstances of each particular case,[1] and declining to act except where clearly necessary to prevent a failure of justice.[2] And in England, also, previously to the enactment of the Railway Companies Act,[3] the courts were extremely averse to the appointment of receivers with power to operate railroad property.[4] When, in order to prevent adverse proceedings by the creditors of a railroad, and to utilize the income for the permanent improvement of the property by diverting it from the payment of the debts of the corporation, a receiver was appointed by collusion of the parties, the court, when it knew the facts, discharged the receiver *ex mero motu*.[5] A receiver will be appointed for a railroad only as an adjunct to the enforcement of the equitable rights of the parties, and never merely to manage the property at the instance of parties dissatisfied with its control.[6]

1 Sage v. Memphis etc. R. R. Co. 125 U. S. 361, and cases cited *infra*.

2 *Stevens v. Davison*, 18 Gratt. 819; 98 Am. Dec 692. And see, generally, Overton v. Memphis etc. R. R. Co. 10 Fed. Rep. 866; S. C. 3 McCrary, 436; Meyer v. Johnston, 53 Ala. 237; Kelly v. Trustees etc. 58 Ala. 489; Milwaukee etc. R. R. Co. v. Soutter, 2 Wall. 510; S. C. Woolw. C. C. 49; Wallace v. Loomis, 97 U. S. 146.

3 30 and 31 Vict. ch. 127 (1867), made perpetual, 38 and 39 Vict. ch. 31 (1875). The provisions of this act are discussed in In re Beddgelert R'y Co. W. N. (1871) 3; S. C. 19 Week. R. 427; In re Manchester & M. R'y Co.; Ex parte Cambrian R'y Co. Law R. 14 Ch. Div. 645; In re Birmingham etc. Junction R'y Co. Law R. 13 Ch. D v. 155; In re Stafford & Uttoxeter R'y Co. W. N. (1838) 113; In re Southern R'y Co. 5 Law R. (Ir.) 165.

4 Beach on Receivers, § 325, citing Gardner v. London etc. R'y Co.

6 American Loan and Trust Co. v. Toledo etc. R'y Co. 29 Fed. Rep. 416, 420; Beach on Receivers, § 228. *Cf.* Brandt v. Allen (1888), 76 Iowa, 50; Jones v. Bank of Leadville (Colo. 1888), 17 Pac. Rep. 272.

§ 700. The adequacy of remedies at law as affecting the appointment of a receiver.—Courts of chancery will not exercise their extraordinary power of appointing a receiver where the parties have an adequate remedy at law.[1] The fact that the pursuit of the remedy at law is difficult,[2] or that it has been lost by the laches of the applicant, will not be sufficient to enable the court to act.[3] When clauses are inserted in mortgages and deeds of trust upon railways, whereby the mortgagees, or trustees for their benefit, may in case of default take possession of the property and operate the railway, receiving and applying the income therefrom to the payment of their liens, and no effort is made to obtain possession, and especially when it is not shown that the security is inadequate, courts of equity will refuse to appoint a receiver.[4] But when trustees, or others authorized by the mortgage to take possession of the mortgaged property, refuse or neglect to do so after the happening of the contingent event, and the holders of bonds secured by the mortgage themselves seek to enforce their rights by a bill in equity, a case is presented which does not depend upon the inadequacy of the security, and a receiver may be appointed.[5] So, also, when bonds are an equitable charge upon tolls of a railroad, and the holders cannot enforce their demand by a proceeding at law on account of the great inconvenience involved, a receiver may be appointed over the tolls and the business of the road; in such case the bondholders will not be required first to re-

cover a judgment at law and issue execution, if the right to be paid out of the tolls is conferred by the bonds themselves; and if a receiver is already in possession, the payment of the claims of such bondholders will be extended to him.[6] The same action may be taken by the court if the proceeding be not for the foreclosure of the mortgage, but to obtain possession after default by virtue of a clause in the mortgage, it being shown that the property mortgaged is insufficient, and that the debtor railway corporation is insolvent.[7] On the other hand, it has been held that it is not necessary to show that the security of a railway mortgage is inadequate, if the mortgage authorized the trustees to take possession after default, such default being considered sufficient ground to justify the appointment of a receiver; but in this case additional grounds for the relief were shown, one being that the charter and a certain grant of land were in danger of being lost on account of the non-completion of the road within the time limited by law.[8]

1 *Milwaukee etc. R. R. Co. v. Soutter*, 2 Wall. 510, 523; Winkler v. Winkler, 40 Ill. 179; Mullen v. Jenkins, 1 Stockt. 192; Sherman v. Clark, 4 Nev. 138; 97 Am. Dec. 516; Coughron v. Swift, 18 Ill. 414; Poage v. Bell, 3 Rand. 586; Webster v. Couch, 6 Rand, 519; Wooden v. Wooden, 2 Green's Ch. 429. See, also, Parmly v. Tenth Ward Bank, 3 Edw. Ch. 395; Sollory v. Leaver, Law R. 9 Eq. 22; Cremen v. Hawkes, 2 Jones & L. 674; Corey v. Long, 43 How. Pr. 497; S. C. 12 Abb. Pr. (N. S.) 427; Opinion of FRICK, J., in Speights v. Peters, 9 Gill, 476; Morrison v. Buckner, Hemp. 442; Rice v. St. Paul & Pacific R. R. Co. 24 Minn. 464.

2 Cremen v. Hawkes, 2 Jones & L. 674.

3 Brown v. Chase, Walker (Mich.) 43; Kean v. Colt, 1 Halst. Ch. 365; Fogarty v. Bourke, 2 Dru. & W. 530; Gray v. Chaplin, 2 Russ. 126; Skinners' Company v. Irish Society, 1 Mylne & C. 162; Drewry v. Barnes, 3 Russ. 94; Municipal Com'rs etc. v. Lockhart, Ir. Rep. 3 Eq. 515.

4 Rice v. St. Paul etc. R. R. Co. 24 Minn. 464; Williamson v. New Albany etc. R. R. Co. 1 Biss. 198; Union Trust Co. v. St. Louis etc. R. R. Co. 4 Dill. 114. See, however, Allen v. Dallas etc. R. R. Co. 3 Woods, 316.

5 Wilmer v. Atlanta etc. R. R. Co. 2 Woods, 409.

6 Imperial Mercantile Credit Assoc. v. Newry etc. R'y Co. Ir. Rep. 2 Eq. 1; Beach on Receivers, § 355. Acc. Crewe v. Edleston, 1 DeGex & J. 93.

7 Dow v. Memphis etc. R. R. Co. 20 Fed. Rep. 260; Sacramento etc. R. R. Co. v. Superior Court, 55 Cal. 453, in which case a surviving trustee brought the suit to enforce the trust and to obtain possession of the mortgaged property

8 Allen v. Dallas etc. R. R. Co. 3 Woods, 316.

§ 701. Under what circumstances the court will appoint a receiver.—The appointment of a receiver rests in the discretion of the court, and is not ground for a demurrer to a bill praying for the appointment.[1] In foreclosure proceedings, courts of equity always have the power, where the debtor is insolvent and the mortgaged property insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, to appoint a receiver to preserve not only the *corpus*, but the rents and profits for the satisfaction of the debt.[2] Generally, however, the court will refuse to appoint a receiver where it has no reason to believe that benefit will result from the appointment, or that a refusal will cause an injury, or if it be apparent that the exercise of its power in this respect will cause confusion or difficulty in the management of the property,[3] or if it appear that the appointment will cause a greater injury to the property than if its possession is not disturbed, or if, from other considerations, the appointment will evidently be inexpedient or harmful.[4] In such cases the consent of the parties will not affect the action of the court, more particularly if the rights of others are likely to be adversely influenced.[5] And, that it will not produce actual harm is clearly insufficient. There must be some good affirmative reason for making the appointment.[6] Even where a statute authorizes the appointment of a receiver in certain

cases, the chancellor may exercise his discretion and refuse the appointment except upon good cause shown.[7] The court is also influenced by the probability as to whether or not the party making the application will in the end be entitled to a judgment in his favor upon the merits of the case, and, if there be doubt in regard to it, a receiver will be refused.[8]

1 Verplanck v. Caines, 1 Johns. (N. Y.) Ch. 57. *S. P.* Lottimer v. Lord, 4 Smith E. D. (N. Y.) 132; Chicago etc. Co. v. United States Co. 57 Pa. St. 83. See, also, Milwaukee etc. R. R. Co. v. Soutter, 2 Wall. 440, 510.

2 Grant v. Phœnix etc. Ins. Co. 121 U. S. 105.

3 Hamburgh Manuf. Co. v. Edsall, 4 Halst. Ch. 141.

4 Vose v. Reed, 1 Woods, 647; Tysen v. Wabash etc. R'y Co. 8 Biss. 247.

5 Whelpley v. Erie R'y Co. 6 Blatchf. 271.

6 Orphan Asylum v. McCartee, Hopk. Ch. 429; Corey v. Long, 43 How. Pr. 498; S. C. 13 Abb. Pr. N. S. 427.

7 Newfoundland Railroad Construction Co. v. Schack, 40 N. J. 222, construing Revision of New Jersey, 182, "Corporation Act."

8 Wilkinson v. Dobbie, 12 Blatchf. 298; Owen v. Homan 3 Macn. & G 378; S. C. 4 H. L. Rep. 997; Beach on Receivers, § 5.

§ 702. *(a).* **Of insolvency as a ground for appointing a receiver.**—Mere insolvency is not necessarily a ground for an appointment; but where insolvency is conceded, with no reasonable prospect of recovery in the near future from the financial difficulties, and there is a disagreement between the parties in interest, a receiver will be appointed in order to secure the rents and profits of the property pending the final decision of the case.[1] While the appointment of receivers does not follow as a matter of course upon a decree declaring a corporation insolvent, but rests in the discretion of the chancellor, yet, generally, receivers will be appointed, unless it be shown to be for the interest of the creditors and stockholders to leave the directors in charge of the affairs. So, where it appeared that

the insolvency of a corporation had been long known to the directors, and with such knowledge sales of its property had been made to them, to pay antecedent debts due to them, a receiver was appointed to investigate the legality of these sales, though the corporation appeared to have no property.[1] In an action brought by the trustee of a mortgage of a railroad corporation, which had been declared bankrupt, having interest accumulated on its bonds exceeding the value of the property mortgaged, the purchasers of the equity of redemption at the assignee's sale being in possession of the road, receiving its income and using the property for their exclusive benefit, it was held that a clear case was presented for the appointment of a receiver, and that such appointment would not be an interference with the corporate power and authority over the road or a disturbance of corporate possession, but merely of the possession of the purchasers from the assignee.[2] A corporation, which has made an assignment in the interest of its creditors, comes within the terms of the Wisconsin statute,[4] providing for the appointment of receivers for insolvent corporations.[5] But an application for the appointment of a receiver of a corporation will not be granted on a mere allegation of insolvency and suspension of business for want of funds, it not being shown what facts and circumstances would constitute the insolvency.[6]

1 *Mercantile Trust Co. v. Missouri, Kan. & Tex. R'y Co.* 4 Ry. & Corp. Law J. 3.2; 8. C. 36 Fed. Rep. 221.

2 Nichols v. Perry etc. Co. 11 N. J. Eq. 126.

3 Kelly v. Alabama etc. R. R. Co. 58 Ala. 489. Beach on Receivers, § 347.

4 Wis. Rev. Stat. § 2216.

5 Powers v. C. H. Hamilton Paper Co. 69 Wis. 22.

§ 703. (*b*). **Of default in payment of interest or principal as a ground for appointing a receiver.**—Default in payment of interest is not of itself sufficient to authorize the appointment of a receiver, until the court has determined whether the right to foreclose exists.[1] Thus, default in payment of interest upon a mortgage indebtedness having been waived, and the time of payment extended, it cannot be taken advantage of as a ground for the appointment of a receiver upon the subsequent disagreement of the parties.[2] But in England, where a common carrier, incorporated by an act of Parliament, was authorized to raise money upon the security of its tolls, and exercised the power granted to it for the purpose of carrying on its undertaking, the court of chancery held that a receiver might be appointed in aid of the mortgagee in an action founded upon the failure to pay the principal debt when it matured.[3] On the other hand, it is not necessary that default take place before a receiver will be appointed. Thus, if a default is imminent and manifest, and the corporation is in danger of being broken up, and its business is likely to be destroyed, it lies in the discretion of the court to place its affairs in the hands of a receiver whenever the welfare of the various interests involved clearly requires such action, even though no default has actually been made in its obligations to the party who has filed the bill and made the application.[4]

1 American Loan & Trust Co. v. Toledo etc. R. R. Co. 29 Fed. Rep. 416; Williamson v. New Albany etc. R. R. Co. 1 Biss. 198, and Tyson v. Wabash etc. R'y Co. 8 Biss. 247.

2 American Loan & Trust Co. v. Toledo etc. R. R. Co. 29 Fed. Rep. 416.

3 Hopkins v. Worcester etc. Proprietors, Law R. 6 Eq. 437. In this case the receiver appointed was ordered, after paying the costs of the pro-

ceeding, to keep down the interest on the mortgages and pay the balance into court.

4 Brassey v. New York etc. R. R. Co. 19 Fed. Rep. 663; S. C. 22 Blatchf. 72. In this case SHIPMAN, J., refused a petition for the appointment of a co-receiver. As to the inadvisability of having two or more receivers for railroad property, see Beach on Receivers, § 167.

§ 704. (c). **Of the right to foreclose as a ground for appointing a receiver.**—In England, it has been held that all appropriate and necessary remedies to secure payment are necessarily incident to the power of mortgaging tolls and rents of corporations; so that, although the act of Parliament which grants the power does not in express terms confer the right to have a receiver appointed in the particular case, that right will be inferred as being of necessity incident to the power to mortgage.[1] In America, however, the right to foreclose does not necessarily carry with it the right to have a receiver appointed.[2] The mere disagreements of parties in a foreclosure suit as to the management of the property, is not sufficient ground for the appointment of a receiver.[3] That can only be done as an incident to some relief falling within the jurisdiction of the court, in relation to the contracts of the parties. The appointment of a receiver, simply to manage the property, is not within the power of a court of equity.[4] But the inadequacy of the railway property as security for the mortgage debt, together with insolvency, or such a precarious condition of corporate finances as renders it likely that the complaint will not be in as good a position at the final decree, as at the time of his application for the appointment of a receiver, is considered good ground for the interposition of the court.[5] Thus, evidence that a rail-

road, heavily mortgaged, has made several defaults in payment of interest, aggregating over a million dollars; that the business is decreasing, with probability of further decrease from competition with new lines; that it is in need of repairs and improvements; that the bondholders are not in harmony; that a foreclosure is about to be decreed; and that no other way exists for applying the rents and profits of the road to its debts—is sufficient ground for the appointment of a receiver.[1]

1 De Winton v. Mayor of Brecon, 26 Beav. 533; S. C. 28 Beav. 200; Beach on Receivers, § 356.

2 *Mercantile Trust Co. v. Missouri, Kan. & Tex. R'y Co.* 4 R'y & Corp. Law J. 362; S. C. 36 Fed. Rep. 221.

3 *American Loan and Trust Co. v. Toledo etc. R. R. Co.* 29 Fed. Rep. 416.

4 *American Loan and Trust Co. v. Toledo etc. R'y Co.* 29 Fed. Rep. 416.

5 NELSON, J., in Ruggles v. Southern Minnesota R. R. Co. 17 Int. Rev. Rec. 29. To the same effect, see Keep v. Michigan etc. R. R. Co. (U. S. Cir. Ct. W. D. Mich. 1873), 6 Chicago *Legal News*, 101, where, in addition to inadequacy of security and insolvency of the road owing the debt, making it irresponsible for any deficiency upon the sale of the mortgaged property, it was shown that the corporation neglected to apply the net earnings of the road to the payment of accrued interest; Fullan v. Cincinnati etc. R. R. Co. 4 Biss. 35.

6 *Mercantile Trust Co. v. Missouri, Kan. & Tex. R'y Co.* 4 R'y & Corp. Law J. 362; S. C. 36 Fed. Rep. 221.

§ 705. (*d*). Of internal corporate disagreements and derangements.—Where the governing body, owing to disputes, cannot properly conduct the business of a company, a receiver may be appointed until a competent governing body is constituted.[1] And if the owners of a majority of the stock in a corporation neglect to elect officers, and it appear that there is no person authorized to conduct the affairs of the corporation, a receiver may be appointed, on the application of a stockholder, to preserve the corporate property.[2] It has been

tion of railroad companies was pending, the participation of certain stockholders, who had been enjoined from so doing, in the election of directors for the new consolidated company, at a meeting held in pursuance of a statute prescribing the method of their election, was no sufficient ground for the appointment of a receiver.[3] Nor will a receiver be appointed upon a bill that was filed by the holder of the stock of a railroad corporation, which he alleged had been unlawfully issued, praying for an inquiry into its legality, and for repayment of the amount paid by him for such shares if their illegality should be established, and for an injunction against the disposal of so much property as would provide for the repayment and for the receivership.[4]

1 Featherston v. Cooke, Law R. 16 Eq. 298.

2 Lawrence v. Greenwich Fire Ins. Co. 1 Paige, 587. As to suits by stockholders looking to the appointment of a receiver in such a case, see, also, Sheppard v. Oxenford, 1 Kay & J. 491; Evans v. Coventry, 5 De Gex. M. & G. 911.

3 Railway Co. v. Jewett, 37 Ohio St. 649.

4 Whelpley v. Erie R'y Co. 6 Blatchf. 271, where the court refused both the injunction and the receivership, because it appeared that the money received by the railroad company for the bonds had not been kept separate from its general funds, and could not be traced and identified. It was also held in this case that an order for an injunction and receiver will not be made in an improper case, even on consent of both parties, especially if the rights of third parties are affected. But in Brassey v. New York etc. R. R. Co. 19 Fed. Rep. 663, S. C. 22 Blatchf. 72, it was held that the mere concurrence of directors in an attempt to secure the appointment does not amount to fraudulent collusion, unless they design some injury to the company or its creditors: Beach on Receivers, § 332.

§ 706. (*e*). Of failure to run trains.—Where, as in New Jersey, a statute for the protection of the rights and convenience of the public authorizes the chancellor to appoint a receiver for a railroad upon the petition of any citizen showing that it has failed and neglected to run daily trains on any part of its road for the space of ten days, the proceedings

of a receiver appointed under the authority of the act will not be stayed to allow an inquiry into the causes of the failure of the company to operate its road, since the objects to be obtained are the convenience of the general public and the relief of the citizens along the line of the road. In such a case it is obligatory upon the court to take the measures designated in the act in order to relieve the public from the effect and consequences of the dereliction of duty on the part of the owners of the road; the public necessity is paramount, and the court will release its hold only when it is satisfied of the ability and readiness of the company to operate its lines.[1]

2 In re Long Branch etc. R. R. Co. 24 N J. Eq. 398, construing N. J. Act of Feb. 12, 1874; Beach on Receivers, 329.

§ 707. (*f*). **Sundry cases.**—In a case in which a railroad company had been granted a large quantity of valuable land upon condition that its road should be completed within a certain time, and the bondholders, who were secured upon the property of the company of which the land so granted formed the principal part of the security, made application for the appointment of a receiver, showing that there was great danger of the grant being lost by reason of the road not being completed within the specified time, the court granted the application and authorized the receiver to borrow sufficient money upon his obligations issued as a lien upon the road, in order to complete the line within the time named in the grant, and thus preserve the security.[1] In a case where the charter of a railroad company being repealed, authority to

therefor was given to a new company, and thereupon a petition for damages was filed, but was dismissed for failure to appoint a receiver during the time limited for the closing up the business of the company, it was held that there was no power in a stockholder of the old corporation, subsequently, to have a receiver appointed for the purpose of prosecuting the claim for damages.[2] Where two or more railroads possess a community of interest in property, as where they are tenants in common of a right of way through a tunnel, a court of equity will protect one of them against the injustice of the others, for otherwise the party whose rights are invaded would be without adequate remedy. This is especially so, because railroads, although technically private corporations, are in some measure public agents. But in such case the court will not readily place the tunnel itself in the hands of a receiver, if it can administer justice between the parties by means of an injunction or some other sufficient remedy.[3]

1 Kennedy v. St. Paul etc. R. R. Co. 2 Dill. 448. The report contains the order made in the case. See, also, S. C. 5 Dill. 519; Beach on Receivers, § 352.

2 Bigelow v. Union Freight R. R. Co. 137 Mass. 478.

3 Delaware etc. R. R. Co. v. Erie R'y Co. 21 N. J. Eq. (6 Green C. E.) 293, 311; Beach on Receivers, § 339.

§ 708. Of the court which may appoint a receiver.—The power to appoint a receiver is inherent in a court of chancery, and has regularly descended to all courts which have jurisdiction in equity.[1] This power is generally confined to courts having original jurisdiction, and is rarely exercised by those having appellate jurisdiction only; and, when it becomes necessary for such courts to

appoint a receiver, in order to enforce their powers as courts of appeal and for the due administration of justice, they must have jurisdiction of the suit by appeal, and of the person against whom the remedy is sought.[2] The United States Supreme Court has refused an application for the appointment of a receiver, saying, however, that it would not undertake "to decide whether a case may not arise in which we would exercise the power of appointing a receiver pending an appeal to this court."[3] The New York statute, requiring an application for the appointment of a receiver to be made in the judicial district in which the principal office of the company is situated, does not apply to the case of a receiver appointed to take charge of mortgaged property pending foreclosure.[4] Where a railway lies in two or more States, a receiver may be appointed in any one of the several jurisdictions; and a court will not hesitate in its action because its authority does not extend over the whole road, but will exercise it to the extent of its territorial jurisdiction, treating and dealing with such portion of the mortgaged property and franchises as are situated within the State where the suit is brought, as if the corporation were one created by that State alone.[5]

1 Skinner v. Maxwell, 96 N. C. 4[illegible]; Folsom v. Evans, 6 Minn. 418; U. S. Stat at Large, 276; Supreme Court of Judicature Act, 36 and 37 Vict. ch. 66, sec. 25, § 8. For a construction and instances of the application of this clause, see In re Coney, Law R. 29 Ch. Div. 993; Stranger Leathes v. Stranger Leathes, Weekly Notes, 1882, p. 71; In re Parker (Dearing v. Brooke), 54 Law R. Ch. 634; McGarry v. White, 16 Law R. (Ir.) 322; Hewett v. Murray, 54 Law J. Ch. 572; S. C. 52 Law T. 380; Pease v. Fletcher, 1 Ch. Div. 273; Porter v. Lopes, 7 Ch. Div. 358; Anglo-Italian Bank v. Davies, 9 Ch. Div. 275; Bryant v. Bull, 10 Ch. Div. 153; Smith v. Cowell, 6 Q. B. Div. 75; Fuggle v. Bland, 11 Q. B. Div. 711; Howe v. Dawson, 13 Q. B. Div. 67; Hyde v. Warden, Law R. 1 Exch. Div. 309.

2 Kerr v. White, 7 Baxter, 364; Allen v. Harris, 4 Lea, 190.

3 Pacific R. R. v. Ketchum, 95 U. S. 1. In Tennessee the appellate

court appointed a receiver for the property in controversy in a case pending before it on appeal: West v. Weaver, 3 Heisk. 589; Beach on Receivers, § 11.

4 United States Trust Co. v. New York etc. R'y Co. 35 Hun. 341. As to adjudications concerning the power of certain State courts to appoint receivers, see Beach on Receivers, § 14, citing Pressley v. Lamb, 105 Ind. 171; First Nat. Bank v. U. S. Encaustic Co. 1 5 Ind. 227; Bitting v. Ten Eyck, 85 Ind. 357. See the case last cited, and Hursh v. Hursh, 99 Ind. 500, as to the practice and procedure: Smith v. Hutcher, 28 Gratt. 144; Hammock v. Lyon etc. Trust Co. 105 U. S. 77; Real Estate Associates v. Superior Court, 60 Cal. 223; Cousins v. Smith, 13 Vesey, 164; Ewing v. Blight, 3 Wall. Jr. 139; Day v. United States Car Spring Co. 2 Duer (N. Y.), 608; Potter v. Merchants' Bank, 23 N. Y. 641; 80 Am. Dec. 273; Stewart v. Beebe, 18 Barb. 34; Savings Institution v. Makin, 23 Me. 360; Cox v. Volkert, 86 Mo. 505; Alexander v. Manning, 58 Miss. 634; Brown v. Carolina Central R'y Co. 83 N. C. 128; Corbin v. Berry, 83 N. C. 27. With respect to conflict of jurisdiction as to the appointment between courts of the same State, see Beach on Receivers, § 15, citing Stearns v. Stearns, 16 Miss. 167; O'Mahony v. Belmont, 37 N. Y. Super. Ct. 380; McCarthy v. Peake, 18 How. Pr. S. C. 9 Abb. Pr. 164; Pugh v. Brown, 19 Ohio 252, 211; Young v. Montgomery & E. R. Co. 2 Woods, 606; U. S Trust Co. v. N. Y., W. S. & B. R. R. Co. 67 How. Pr. 390.

5 State v. Northern Central R. R. Co. 18 Md. 193. See, also, Wilmer v. Atlanta etc. Air Line R. R. Co. 2 Woods, 409. *Cf.* Graham v. Boston etc. R. R. Co. 118 U. S. 161.

§ 709. The court first obtaining jurisdiction retains it.—As a general rule, the court which first acquires jurisdiction of the *res*, or subject-matter, will retain such juridisction until the end of the litigation, and its possession and control of the property is exclusive of the interference of other courts.[1] Although this rule is subject to limitations, it is well settled that, while the property is in possession of a court, either actively or constructively, that court is bound to protect its possession from the process of other courts.[2] In recognition of this principle, the State courts have refused to take cognizance of a suit to foreclose, when the mortgaged property was in the possession of a receiver appointed by a federal court, and have relegated the applicants to that court for relief.[3] A statute prescribing proceedings to enable the owners of animals killed on a railroad to hold lessees, assignees, receivers, etc., jointly liable with the cor-

poration in damages, was held not to give State courts jurisdiction over the property of railroad corporations placed in charge of a receiver appointed by a federal court, but it was intimated that such a suit might be maintained against a receiver appointed by the State court.[4] A federal court will refuse to take jurisdiction of a bill to call on a receiver, in possession of railroad property under the order of a State court, to render an account and collect the assets under its direction, requiring the party so applying to pursue his remedy before the State court which appointed and should control its receiver.[5] Under the Federal Bankruptcy Act, the United States courts, sitting in bankruptcy, refused ordinarily to interfere with the possession of receivers previously appointed by State courts.[6] On the other hand it has been held that when a railroad company is in the possession of a receiver appointed by a United States court, a telegraph company cannot acquire title to its right of way by proceedings for condemnation in a State court without leave from the federal court.[7] Where a party inaugurated proceedings in foreclosure in a State court after he had begun a similar suit in a federal court, but before adjudication, and the State court appointed a receiver and made a decree of foreclosure, under which a sale was made, the federal court regarded the action of the State court as an interference, and on application of a bondholder, appointed a receiver and proceeded to adjudicate the rights of all who had been before it.[8] Inasmuch as, in New Jersey, a verdict before entry of judgment thereon in the State court creates no lien on real estate, if a receiver for a railroad corporation,

against which such a verdict has been obtained, has been appointed before such entry by the United States Circuit Court for the district of New Jersey, in a proceeding ancillary to a suit in the United States Circuit Court of Pennsylvania, the receiver will not be ordered by the court in New Jersey to pay the judgment; but the plaintiff must make application for an order for payment to the court in Pennsylvania.[9] And as between courts of the same State, it has been held that one court will not attempt, by a writ of *mandamus*, to direct the receivers appointed by another court of competent jurisdiction as to the management of their trust.[10]

1 Beach on Receivers, §§ 22, 23, 348.

2 Buck v. Colbath, 3 Wall. 334, 342; Andrews v. Smith, 19 Blatchf. 100. *Vide infra*, §§ 731, 733.

3 Milwaukee etc. R. R. Co. v. Milwaukee etc. R. R. Co. 20 Wis. 165; 85 Am. Dec. 735. But see Thompson v. Van Vechten, 3 Duer, 618.

4 Ohio etc. R. R. Co. v. Fitch, 20 Ind. 498.

5 Conkling v. Butler, 4 Biss. 22.

6 Alden v. Boston etc. R. R. Co. 5 Nat. Bank. Reg. 230; Beach on Receivers, § 338.

7 Western Union Telegraph Co. v. Atlantic etc. Telegraph Co. 7 Biss. 367.

8 Bill v. New Albany etc. R. R. Co. 2 Biss. 390. Consult, also, Union Trust Co. v. Rockford etc. R. R. Co. 6 Biss. 197.

9 Jennings v. Philadelphia etc. R. R. Co. 23 Fed. Rep. 569, 574

10 State v. Marietta etc. R. R. Co. 35 Ohio St. 154; Beach on Receivers, § 338.

§ 710. The rule as to priority of obtaining jurisdiction.—As to what constitutes the acquiring of jurisdiction of the subject-matter sufficient to enable a court to exercise exclusive jurisdiction over it, there appears to be some conflict. The better rule seems to be that laid down in a case in the United States Circuit Court, wherein BLODGETT, J., said: "The proper application of the rule does not require that the court which first

takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure, for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of the property; and while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit unavailing. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained."[1] A contrary view of the question was taken by WOODS, J., who held that prior seizure of the property determined the priority of jurisdiction, and refused to disturb the possession of a State court which had obtained possession after the filing of a bill and service of process in the federal court.[2]

1 Union Trust Co. v. Rockford etc. R. R. Co. 6 Biss. 197.

2 Wilmer v. Atlanta etc. R. R. Co. 2 Woods, 409; Beach on Receivers, § 349.

§ 711. Of the time when a receiver may be appointed.—In several of the States the courts have power to appoint receivers during vacation;[1] but in others, a contrary rule prevails.[2] As a suit in chancery is not begun until the filing of the bill, an appointment of a receiver upon an *ex parte* application before the bill is filed is error, and will be revoked upon appeal, without considering the merits of the application.[3] After the suit is begun, the application for a receiver may be made, and a receiver may be appointed, at any stage of the proceedings, whenever the facts authorize and require

it.[4] There seems to be no doubt that courts of equity jurisdiction, in cases where this extraordinary remedy of a receivership is necessary to the preservation of the property in litigation, will not hesitate to exercise their power even after an appeal has been taken on the merits.[5] And a receiver may be appointed on final hearing and as a part of the final decree,[6] or even after final decree.[7] Thus, when by the laws of the State a sale cannot be made until after a certain time has elapsed from the date of the decree, a receiver may be appointed after the decree of foreclosure is entered.[8] But the appointment of a receiver need not be postponed until the final hearing of the case.[9] And a receivership created by an interlocutory decree is held not to be superseded by reason of not being expressly continued by the final decree.[10]

1 Pressley v. Lamb, 195 Ind. 171; First National Bank v. United States etc. Co. 105 Ind. 227; Bitting v. Ten Eyck, 85 Ind. 357; Hursh v. Hursh, 99 Ind. 100. As to practice and procedure, see Smith v. Butcher, 28 Gratt. 144; Real Estate Associates v. Superior Court, 60 Cal. 223.

2 Hammock v. Loan & Trust Co. 105 U. S. 77; Newman v. Hammond, 46 Ind. 319. In Illinois an order at chambers appointing a receiver of a railroad is not authorized (Hammond v. Loan & Trust Co. 105 U. S. 77), but the appointment must be deemed to have been made by the court itself from and after the entry of the order at the next term of the court confirming what has been done at chambers: Hervey v. Illinois Midland R. R. Co. 28 Fed. Rep. 169, 172.

3 Crowder v. Moore, 52 Ala. 220.

4 Henshaw v. Wells, 9 Humph. (Tenn.) 568.

5 Merrill v. Elam, 2 Cooper's Ch. (Tenn.) 513; Penn Mutual Life Insurance Co. v. Semple, 33 N. J. Eq. 314; Beard v. Arbuckle, 19 W. Va. 145; Hutton v. Lockridge, 27 W. Va. 428.

6 Schulte v. Hoffman, 18 Texas, 678; Shee v. Harris, 1 Jones & L. (Ir.) 91.

7 Beard v. Arbuckle, 19 W. Va. 145; Brinkman v. Ritzinger, 82 Ind. 358; Schrieber v. Carey, 48 Wis. 298; Hass v. Chicago Building Society, 69 Ill. 498; Connelly v. Dickson, 76 Ind. 446; Wright v. Vernon, 3 Drew. 112; Merrill v. Elam, 2 Cooper's Ch. (Tenn.) 513; Thomas v. Davies, 11 Beav. 29. But see Adair v. Wright, 16 Iowa, 385.

8 Benedict v. St. Joseph etc. R. R. Co 19 Fed. Rep. 173, the suit being brought in behalf of bondholders secured upon the net income of the road; Beach on Receivers, § 347.

9 Brassey v. New York etc. R. R. Co. 22 Blatchf. 72, 79; Turnbull v. Prentiss Lumber Co. 55 Mich. 387. But see American Loan & Trust Co. v. Toledo etc. R'y Co. 29 Fed. Rep. 416, 420, where the appointment was refused until the court should determine whether the right of foreclosure existed.

10 Grant v. Phœnix Life Ins. Co. 121 U. S. 105.

§ 712. The same subject, continued.—A motion for a receiver will be entertained while a plea to an amended bill is pending and not disposed of,[1] or while a demurrer to the bill is pending and undetermined.[2] It is now well established that the application may be made and the receiver appointed before the defendant's answer is filed, whenever the court is satisfied of the plaintiff's equitable claim to or interest in the property in controversy, and that immediate action is necessary to preserve it from the danger of loss or injury, or where fraud is clearly shown, and where danger is imminent unless a receiver be appointed to preserve the property.[3] But the grounds upon which the court will appoint a receiver before answer filed must be very strong and the emergency great.[4] It has even been held that a receiver may be appointed over the assets of an insolvent corporation before the court has acquired jurisdiction over it by a service of summons as required by statute, other defendants being duly served. In such a case the appointment is in the nature of an equitable attachment, whereby the court acquires the custody of the property and retains it until the final determination of the case.[5] But the pendency of a plea to the jurisdiction of the court necessarily precludes all further action of the court until it is decided,[6] and pending such plea a receiver will not be appointed; but, in order to guard against the abuse of dilatory pleas, the

court will order an immediate hearing or trial of the plea.[7] A receiver is, as between the parties to the suit, to be considered as appointed from the date of the order of reference to the master.[8]

1 Thompson v. Selby, 12 Sim. 100.

2 Turnbull v. Prentiss Lumber Co. 55 Mich. 387; Howard v. Palmer, Walker's Ch. (Mich.) 391. But see Cook v. Detroit etc. R. R. Co. 45 Mich. 453.

3 Johns v. Johns, 23 Ga. 31; Clark v. Ridgely, 1 Md. Ch. 70; Bloodgood v. Clark, 4 Paige, 574; Bank of Monroe v. Schermerhorn, Clarke's Ch. (N. Y.) 214; Jones v. Dougherty, 10 Ga. 273; Williams v. Jenkins, 11 Ga. 595; Duckworth v. Trafford, 18 Ves. 283; Whitehead v. Wooten, 43 Miss. 523; Davis v. Browne, 2 Del. Ch. 18; Probasco v. Probasco, 30 N. J. Eq. 108; Micou v. Moses, 72 Ala. 433; Duckworth v. Trafford, 18 Ves. 283; Metcalfe v. Pulvertoft, 1 Ves. & Bea. 180; Woodyatt & Gresly, 8 Sim. 180; Vann v. Barnett, 2 Bro. C. C. 158; Beach on Receivers, § 111.

4 Clark v. Ridgely, 1 Md. Ch. 70; Weis v. Goetter, 72 Ala. 259; Latham v. Chaffee, 7 Fed. Rep. 525; Beecher v. Bininger, 7 Blatchf. 170; The Brick Co. of Baltimore City v. Robinson, 55 Md. 410; Whitehead v. Wooten, 43 Miss. 523; West v. Swan, 3 Edw. Ch. (N. Y.) 420; Baker v. Adm'r of Backus, 32 Ill. 115; Micou v. Moses, 72 Ala. 439.

5 St. Louis etc. Co. v. Sandoval etc. Co. 111 Ill. 32.

6 Cousins v. Smith, 13 Ves. 164.

7 Ewing v. Blight, 3 Wall. Jr. 139.

8 Fairfield v. Weston, 2 Sim. & S. 98.

§ 713. The selection of a receiver is in the discretion of the court—Appeal.—Secured creditors of an insolvent railroad company cannot dictate who shall be appointed a receiver. He is the hand of the court, and the interest of creditors of every grade will be considered in making the appointment.[1] But in case the parties have formally agreed upon a person to manage the matters to be placed in charge of a receiver, such person will be favorably considered by the court for the appointment.[2] And where a bill prays for the appointment of a particular person as receiver, and such person is appointed, it will be presumed that the court appointed him on its own judgment, and not because of the recommendation or prayer of

the bill.[3] His selection, however, is entirely within the discretion of the court, and is subject to review on appeal only upon some overwhelming objection in point of propriety of choice, or some objection fatal in principle.[4] This rule is strengthened by the fact that the order of appointment is interlocutory, and from such orders appeals will not generally lie.[5] But the question, as affected by the interlocutory character of orders relating to receivers, is necessarily one of practice, and as such has been settled in different ways in the different States; in some by statute, and in others by the action of the appellate courts.[6]

1 Richards v. Chesapeake etc. R. R. Co. 1 Hughes, 28, 32. In appointing a manager of a railway company at the instance of judgment creditors, the court should take a broad view of the position and exigencies of the company, and act for the general benefit of all the creditors; but is not to consider itself fettered by any contract or arrangement between the company and any person: In re Hull, Barnsley, and West Riding R'y Co. 57 Law T. 82.

2 Hanover etc. Ins. Co. v. Germania etc. Ins. Co. 33 Hun, 539.

3 Johns v. Johns, 23 Ga. 31.

4 Williamson v. Wilson, 1 Bland. 418; Smith v. New York Con. Stage Co. 23 How. Pr. 208; In re Empire City Bank, 10 How. Pr. 498; Wynne v. Lord Newborough, 15 Ves. 283; Cookes v. Cookes, 2 De Gex, J. & S. 526. But see Perry v. Oriental Hotels Co. Law R. 5 Ch. App. 420; Lupton v. Stephenson, 11 Ir. Eq. 484. *Cf.* Lockhart v. Gee, 3 Tenn. Ch. 352 (Coop. Ch.)

5 Wilson v. Davis, 1 Mont. 98; Wood v Brewer, 9 Ind. 86; Duncan v. Campau, 15 Mich. 415; Brown v. Vandermeulen, 41 Mich. 418; Beecher v. M. & P. R. M. Co. 40 Mich. 307; Beach on Receivers, § 40.

6 Beach on Receivers, § 40. As to the rule in Minnesota, see Grant v. Webb, 21 Minn. 39; Knight v. Nash, 22 Minn. 452. As to the rule in Pennsylvania, Illinois, Kansas and Tennessee, see Beach on Receivers, § 40, citing Holden's Adm'r v. McMakin, Pars. Eq. Cas. 270; Coates v. Cunningham, 80 Ill. 437; Hattenstein v. Conrad, 5 Kan. 249; Kansas Rolling Mill Co. v A., T. & S. F. R. R. Co. 31 Kan. 90; Baird v. Turnpike Co. 1 Lea, 301; Bramley v. Tyree, 1 Lea, 531; Roberson v. Roberson, 3 Lea, 50; Johnston v. Hanner, 2 Lea, 3. As to the rule in Michigan, Florida, North Carolina and New Jersey, see Beach on Receivers, § 41, citing Lewis v. Campau, 14 Mich. 453; 90 Am. Dec. 245; Barry v. Briggs, 22 Mich. 207; Duncan v. Campau, 15 Mich. 415; Brown v. Vandermeulen, 41 Mich. 418; Beecher v. M. & P. R. M. Co. 40 Mich. 307; Scott v. Wayne Circuit Judge, 54 Mich. 312; McClellan's Digest of Laws of Florida, p. 167, ch. 17, § 2; Coates v. Wilkes, 92 N. C. 376; Journeay v. Brown, 2 Dutch. 111. As to the rule in Indiana, California, Nevada and Ohio, see Beach on Receivers, § 42, citing Rev. Stat. Ind. (1881) § 1231; Dale v. Kent, 58 Ind. 531. See, also, Buchanan v. Berkshire Life Ins. Co. 95 Ind. 510; Naylor v. Sidener, 106

Ind. 179; Cal. Code Civil Proc. § 939; French Bank Cases, 53 Cal. 496; Emeric v. Alvarado, 64 Cal. 529; La Societe Francaise v. District Court, 53 Cal. 495; Meadow Valley Mining Co. v. Dodds, 6 Nev. 231. See Callanan v. Shaw, 19 Iowa, 133; Eaton & H. R. R. Co. v. Varnum, 19 Ohio St. 622. See, also, for a discussion of appeal under the Ohio Code, Cincinnati etc. R. R. Co. v. Sloan, 31 Ohio St. 1.

§ 714. The same subject, continued—The New York and federal rule.—In New York, where the statute allows an appeal from an order made in the action upon notice, "where it affects a substantial right," it has been held that an order to set aside the appointment of a receiver in supplementary proceedings appointing a new receiver, and directing the former receiver to account to him, is discretionary, and not appealable to the court of appeals; but an appeal lies from an order, made at the special term of the supreme court, denying a motion to appoint a receiver, and is subject to review by the general term of that court.[1] In the United States Supreme Court, in a case where stockholders filed a bill to set aside a lease of the property of a corporation for fraud, and for the appointment of a receiver, and, after hearing upon the merits, a decree was rendered as prayed in the bill, it was held that the decree was so far final that an appeal would lie, though an accounting was still necessary to determine finally the rights of the parties.[2]

1 Dollard v. Taylor, 33 N. Y. Super. Ct. (1 Jones & S.) 496; Beach on Receivers, § 41.

2 Winthrop Iron Co. v. Meeker, 109 U. S. 180. As to the status of the receiver pending the appeal, see Beach on Receivers, § 46, citing Swing v. Townsend, 24 Ohio St. 1. But see Allen v. Chadburn, 3 Baxt. 225; In re Real Estate Associates, 55 Cal. 336; State v. Johnson, 13 Fla. 33; Hutton v. Lockridge, 27 W. Va. 428; Clark v. Johnston, 15 W. Va. 804.

§ 715. Of eligibility to serve as receiver.—A receiver, being nothing more nor less than the hand of the court, should have no personal interest in

the controversy such as would impair his strict impartiality.[1] But in South Carolina the president and directors of a railway have been ordered to continue in possession after foreclosure, subject to the control of the court, and it was held that this in effect constituted them receivers of the court, and that they continued in possession as officers of the court and not of the company.[2] And in California, a trustee for the mortgage bondholders has been considered eligible as a receiver.[3] In general the court will be influenced in its selection of a receiver by considering his occupation and such other circumstances as may tend to restrict his ability to give to his duties as receiver the requisite care and attention.[4]

1 Ellicott v. Warford, 4 Md. 80; Williamson v. Wilson, 1 Bland, 418; Runyon v. Farmers' & Mech. Bank, 3 Green's Ch. 480; Van Rensselaer v. Emery, 9 How. Pr. 135; Fripp v. Chard R'y Co. 21 Eng. Law & Eq. 53. To the same effect. Central Trust Co. v. Wabash, St. L. & Pac. R'y Co. 1 R'y & Corp. Law J. 12; S. C. *sub nom.* Atkins v. Wabash, St. L. & Pac. R'y Co. 29 Fed. Rep. 161 (1886). But see Davis v. Barrett, 13 Law J. N. S. Ch. 304. As to a party to the suit generally being ineligible, see Beach on Receivers, § 27, citing Watkins v. Worthington, 2 Bland, 509; Leach v. Tisdal, 4 Ir. Ch. N. S. 209; Hanover etc. Ins. Co. v. Germania etc. Ins. Co. 30 Hun. 533; Johns v. Johns, 23 Ga. 31; Davis v. The Duke of Marlborough, 2 Swanst. 118, 125; Cox v. Champneys, Jacob, 506; Bunbury v. Winter, 2 Jacob & W. 205; Meaden v. Sealey, 6 Hare, 620; S. C. 18 Law J. N. S. Ch. 163; Jefferys v. Smith, 1 Jacob & W. 297; Wilson v. Greenwood, 1 Swanst. 483; In re Lloyd, Law R. 12 Ch. Div. 447; Ex parte Stoveld, 1 Glyn. & J. 307; Fingal v. Blake, 2 Molloy, 50; Smith v. N. Y. Consolidated Stage Co. 18 Abb. Pr. 419; S. C. 28 How. Pr. 208; Matter of Eagle Iron Works, 8 Paige, 385; Chamberlain v. Greenleaf, 4 Abb. N. C. 92; Williamson v. Wilson, 1 Bland, 418, where a person who was a brother of one of the parties and son of a creditor, and who was admitted to be a friend and agent of the plaintiff, was removed from his receivership. As to the eligibility of officers acting under the United States, see Edwards on Receivers, 65. As to the eligibility of officers of the court, see Beach on Receivers, § 30, citing Garland v. Garland, 2 Ves. 137; Ex parte Fletcher, 6 Ves. 427; Kilgore v. Hair, 19 S. C. 486; Benneson v. Bill, 62 Ill. 403; As to the eligibility of solicitors and legal advisers, see Beach on Receivers, § 31, citing Kilgore v. Hair, 19 S. C. 486; Benneson v. Bill, 62 Ill. 403; Ex parte Pincke, 2 Mer. 452; Garland v. Garland, 2 Ves. 137; Baker v. Backus, 32 Ill. 79; Merchants' etc. Bank v. Kent, 43 Mich. 292; Wilson v. Poe, 1 Hogan, 322. *Cf.* 2 Daniell's Ch. Prac. ch. 30, § 3; Attorney-Gen. v. Gee, 2 Ves. & B. 208. As to the eligibility of the clerk of a court, see Beach on Receivers, § 32, citing Rogers v. Odom, 86 N. C. 432; Kerr v. Brandon, 84 N. C. 128; Hammer v. Kaufman, 33 Ill. 87; Moore v. Taylor, 40 Hun, 56 (1886); Waters v. Carroll.

see Beach on Receivers, § 33, citing, "Stockholders and directors of insolvent corporations should not be appointed receivers unless the case is exceptional and urgent, and then only on the consent of parties whose interests are to be intrusted to their charge:" Central Trust Co. v. Wabash, St. L. & Pac. R'y Co. 1 R'y & Corp. Law J. 12; S. C. *sub nom.* Atkins v. Wabash, St. L. & Pac. R'y Co. 29 Fed. Rep. 161 (1886); GRESHAM, J. See, also, Buck v. Piedmont & Arlington Life Ins. Co. 4 Fed. Rep. 849; Baker v. Adm'r of Backus, 32 Ill. 79; Freeholders v. State Bank, 28 N. J. Eq. 166; Att'y-Gen. v. Bank of Columbia, 1 Paige, 511; McCullough v. Merchants' etc. Co. 29 N. J. Eq. 217. Such officers were appointed receivers in In re Fifty Four First Mortgage Bonds, 15 S. C. 304. See, also, Gibbs v. Greenville & Columbia R. R. Co. 17 S. C. 396; Attorney-General v. Bank of Columbia, 1 Paige 511; Wiswell v. Starr, 43 Me 401; Buck v. Piedmont & Arlington Life Ins. Co. 4 Fed. Rep. 849; Matter of Eagle Iron Works, 8 Paige, 385 (in this case, however, the proceeding was brought under a statute providing for the dissolution of corporations, and reciting that the officers "may" be appointed receivers); Bank of Munroe v. Schermerhorn, Clarke's Ch. 368; Ex parte Williams, 17 S. C. 336. As to the eligibility of trust companies, see Beach on Receivers, § 34, citing In re Knickerbocker Bank, 19 Barb. 602. The trust company appointed in this case, was specially created by the legislature, in part to aid suitors and the court by assuming the exercise of trusts when it might be difficult to get others to execute them, as here, on account of the largeness of the amount of security that would be required, and the difficulty of obtaining persons competent to give such security and to manage such affairs. As to the eligibility of a mortgagee, see Beach on Receivers, § 37, citing Scott *qui tam* v. Brest, 2 Term. Rep. 233; Chambers v. Goldwin, 9 Ves. 271; S. C. 1 Smith's R. 252; Langstaffe v. Fenwicke, 10 Ves. 405. And see Boothbie v. Hockmore, 1 Vern. 316; French v. Baron, 2 Atk. 120; Carew v. Johnstone, 2 Schoales & L. 301; Scatterwood v. Harrison, Mos. 12; Davis v. Denby, 3 Madd. 170; Edwardson v. Dyson, 70. *Contra*, Davis v. Barrett, 13 Law J. N. S. Ch. 304, in case of exceptional circumstances and doubtful authority; Bolles v. Duff, receiver, etc. 54 Barb. 215; N. Y. Code Civ. Proc. § 2439.

2 In re Fifty Four First Mortgage Bonds, 15 S. C. 304; Ex parte Brown, 15 S. C. 513; Ex parte Williams, 18 S. C. 239.

3 McLane v. Placerville etc. R. R. Co. 66 Cal. 606.

4 Wynne v. Lord Newborough, 15 Ves. 283.

§ 716. Of the receiver's bond.—The receiver must generally give a bond.[1] A bond is not, however, in all cases required.[2] It is, in general, not competent for the parties themselves to dispense with the security of a bond, even by consent. It has, however, been held, where the parties have agreed upon a receiver, and then ask the court that he be appointed without security, that such a proceeding is regular.[3] The receiver's own recognizance may, under certain circumstances, be accepted.[4] The bond, however, is subject to the approval of the court.[5]

1 Tomlinson v. Ward, 2 Conn. 396; Matter of Eagle Iron Works 8 Paige, 385; Johnson v. Martin, 1 Thomp. & C. (N. Y. Sup. Ct.) 534; Lewis v. Creed, 31 Law J. N. S. Eq. 607; Edwards v. Edwards, 2 Ch. Div. 291; reversing S. C. 1 Ch. Div. 454; Ex parte Evans, 13 Ch. Div. 252.

2 Banks v. Potter, 21 How. Pr. 469; Davis v. Barrett, 13 Law J. Ch. N. S. 304; Dilling v. Foster, 21 S. C. 335, 339.

3 Manners v. Furze, 11 Beav. 30. *Cf.* Tylee v. Tylee, 17 Beav. 583; Beach on Receivers, § 179.

4 Ridout v. Earl of Plymouth, Dick. 68; Carlisle v. Berkley, Amb. 599. *Contra*, Bailie v. Bailie, 1 Ir. Eq. 413.

5 Newman v. Hammond, 46 Ind. 119. See §§ 155 *et seq. supra*; Quiggle v. Trumbo, 55 Cal. 626. As to the bond upon an extension of the receivership, see Beach on Receivers, § 175, citing Dowdshire v. Tyrrell, Hayes, 351. If such security be not given, the receiver may be removed: Wise v. Ashe, 1 Ir. Eq. 210. See, also, the same case as to his fees: Smith on Receivers, 192; Edwards on Receivers, 169. As to the number of sureties and assignment of securities, see Beach on Receivers, § 176, citing Read v. Orrery, 3 Atk. 235; Johnson v. Martin, 1 Thomp. & C. (N. Y. Sup. Ct.) 534, citing the case of the Mechanics' Fire Insurance Co. 5 Abb. Pr. 444, 446. As to who may be sureties, see Beach on Receivers, § 177, citing Smith v. Scandrett, Black. W. 444; Beardmore v. Phillips, 4 Maule & S. 173; Lofft, 148; Taylor v. The Life Association of America. 3 Fed. Rep. 465; Cockburn v. Raphael, 2 Sim. & St. 453; Smith on Receivers, 16, 17; Edwards on Receivers, 94.

§ 717. Effect of the appointment upon the rights of the litigants and of third parties. —The purpose of a receivership being to preserve the property contested for, *pendente lite*, it has no effect, of itself, upon the title to such property, either to change it or to create a lien upon it.[1] But a mortgagee acquires a specific lien upon the rents by obtaining the appointing of a receiver of them, and if he be a second or third incumbrancer, the court will give him the benefit of his superior diligence over his senior in respect to the rents which accrued during the time that the elder mortgagee took no measures to have the receivership extended to his suit and for his benefit.[2] It is sometimes necessary to appoint a receiver of property where the interest of the parties to the suit are so connected with those of third persons, that the necessary possession of the officer of the court conflicts with the legal rights of such third persons.

But the court never divests a previous possession of such third persons unnecessarily.[3]

1 *Harman v. McMullin*, 4 R'y & Corp. Law J. 515; **Ellis v. Boston, Hartford & E. R'y Co.** 107 Mass. 1; Ex parte Dunn, 8 S. C. 207; In re Colvin, 3 Md. Ch. Dec. 273; Beverley v. Brooke, 4 Gratt. 211; Skip v Harwood, 3 Atkins, 561; Huguenin v. Baseley, 13 Ves. 105; Cooke v. Gwyn, 3 Atkins 68; Ellicott v. Warford, 4 Md. 80; Blakeney v. Dufaur, 15 Beav. 40; Leavitt v. Yates, 4 Edw. Ch. 162; Brown v. Northrup, 15 Abb. Pr. N. S. 366; Ex parte Walker, 25 Ala. 104; Bitting v. Ten Eyck, 35 Ind. 357; Ellicott v. United States Ins. Co. 7 Gill, 367; Pittsburgh etc. R. R. Co. v. Indianapolis etc. R. R. Co. 8 Biss. 456; Beach on Receivers, § 1.

2 **Post v. Dorr**, 4 Edw. Ch. 412. See to same effect Howell v. Ripley, 10 Paige, 43; Washington Life Ins. Co. v. Fleischauer, 10 Hun, 117; Ranney v. Poyser, 83 N. Y. 1; Sanders v. Lord Lisle, Ir. Rep. 4 Eq. 43; Agra & Masterman's Bank v. Barry, 3 Ir. Rep. 443; Lanauze v. Belfast, Holywood & Bangor R'y Co. 3 Ir. Rep. 454; Miltenberger v. Logansport, R. R. Co. 106 U. S. 286.

3 Chancellor WALWORTH in Vincent v. Parker, 7 Paige, 65; Howell v. Ripley, 10 Paige, 43; Brooks v. Greathead, 1 Jacob & W. 176; Brien v. Pearl, 3 Penn. Ch. 357; Skinner v. Maxwell, 63 N. C. 400; Angel v. Smith, 9 Ves. 335. *Cf.* Riggs v. Whitney, 15 Abb. Pr. 388; Beach on Receivers, § 6.

§ 718. Effect of the appointment upon corporate powers—Upon pending litigation.—The appointment of a receiver does not dissolve the corporation. The effect of his appointment is simply to give him the temporary management of the railroad, under the direction of the court, instead of the manager appointed by the directors of the corporation. It is that and nothing more. As the corporation still exists, it may still exercise, as before, its franchises, provided it does not interfere with the rightful management of the road by the receiver, so far as his duties are defined by the court appointing him. No doubt it may do many corporate acts, and certainly it can do all things necessary to preserve its legal existence, notwithstanding the appointment of the receiver to whom the temporary management of the road is given—otherwise the appointment of a receiver would be tantamount to a dissolution of the corporation.[1] But after the appointment of a re-

ceiver, neither the owner nor any other person can lawfully exercise any act of ownership over the property without the authority of the court,[2] or be held in any way chargeable for the receiver's acts concerning it.[3] The receiver's custody is that of the court, and the rights of the parties to the decree are postponed, to be determined by the ultimate decree of the court.[4] When a receiver was appointed for a railroad while proceedings were pending for a *mandamus* to obtain the bonds of a certain town which had been voted as a subscription to the capital stock of the company, it was held that the proceedings were not abated by the appointment, and that the appointment did not furnish any obstacle to their prosecution so long as the receiver interposed no objection.[5] So, also, a judgment of ouster against the directors of the corporation, who were elected after the receiver's appointment, has been refused, even after its property has been sold.[6]

1 *Ohio etc. R. R. Co. v. Russell*, 115 Ill. 52; S. C. 3 N. E. Rep. 561. To the same effect see State v. Merchant, 37 Ohio St. 251; People v. Barnett, 91 Ill. 422; Safford v. People, 85 Ill. 558, 560. In New York, the question of the dissolution of a railway corporation by the appointment of a receiver seems not to have been ruled upon by the higher courts. As to other corporations, see Kincaid v. Dwinelle, 59 N. Y. 548, affirming S. C. 37 Jones & S. (Super. Ct.) 326, followed in Hollingshead v. Woodward, 35 Hun, 41; Huguenot National Bank v. Studwell, 74 N. Y. 621, reversing S. C. 6 Daly, 13; Green v. Wallkill National Bank, 7 Hun, 63; Beach on Receivers, § 335.

2 Fairfield v. Weston, 2 Sim. & St. 98; Bryan v. Cornick, 1 Cox. 422; Wardle v. Lloyd, 2 Moll. 388; Hutchinson v. Lord Bassarone, 2 Ball & B. 55.

3 Milwaukee etc. R. R. Co. v. Soutter, 2 Wall. 510, 519.

4 Miller v. Bowles, 10 Nat. Bank. Reg. 515.

5 People v. Barnett, 91 Ill. 422.

6 State v. Merchant, 37 Ohio St. 251; Beach on Receivers, § 335.

§ 719. Effect of the appointment upon the liabilities of the company—Damages—Taxes.—The effect of placing a receiver in charge of a railway,

and committing to him the management thereof, is to exempt the company from all liability for damages occurring through its operation while in his hands.[1] It is settled beyond doubt that a railway company, in the absence of a statute imposing liability, is not answerable for injuries resulting from the mistakes or negligence of a receiver, or his agents, while operating the road.[2] Nor can the corporation be prosecuted for the crimes or misdemeanors committed by the agents or servants of the receiver, as the corporation can do no act nor commit any offense while the receiver is in full control.[3] But with respect to a statutory right to damages, a railway company cannot plead that before the cause of action arose its property was in the possession of a receiver, appointed by a federal court by an order which enjoined and restrained the company, its officers and employees from interfering with the possession of the receiver, or with the management or operation of the road.[4] And a claim of the State for taxes upon the franchise of a corporation, which in the possession of a receiver continues to be a going concern, is superior to the rights of mortgage bondholders, and the court may order it to be paid out of the gross earnings in the receiver's hands.[5] So, too, a State has recovered judgment against a railroad company for taxes due upon the gross earnings of the road, notwithstanding the road had been placed in the hands of receivers, who were operating the road and controlling its earnings during the time for which the taxes were levied.[6]

1 Bell v. Indianapolis etc. R. R. Co. 53 Ind. 57. But see Indianapolis etc. R. R. Co. v. Ray, 51 Ind. 263.

2 *Godfrey v. Ohio etc. R'y Co.* 116 Md. 30; 4 R'y & Corp. Law J. 544, 545;

Railroad Co. v. Davis, 23 Ind. 553; State v. Railroad Co. (Ind. Oct. 1888); High on Receivers, § 396. Where a plaintiff, intending to take passage from N. to C., purchased a ticket which, by mistake, purported to take the holder from C. to N., the road being in the hands of a receiver, and the mistake being due to the negligence of the receiver, or his agent, the company itself could not be held liable for the damage occasioned thereby, nor for the cost of the ticket: *Godfrey v. Ohio etc. R'y Co.* 116 Md. 30; 4 R'y & Corp. Law J. 544, 545.

3 State v. Wabash R'y Co. 115 Ind. 466; 4 R'y & Corp. Law J. 417; Bell v. Railroad Co. 53 Ind. 57.

4 Ohio etc. R. R. Co. v. Russell, 115 Ill. 52; Beach on Receivers, § 335.

5 Central Trust Co. v. New York etc. R. R. Co. 110 N. Y. 250, citing In re Receivership of Columbian Ins. Co. 3 Abb. N. Y. App. 239; and Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434; and distinguishing Commonwealth v. Lancaster Savings Bank, 123 Mass. 493, where a receiver had been appointed to wind up the affairs of the corporation.

6 Philadelphia etc. R. R. Co. v. Commonwealth, 104 Pa. St. 80; Beach on Receivers, § 335.

§ 720. **Removal.**—The power of removal being incident to the power of appointment, the court whose officer the receiver is, may, in a proper case, direct his removal, and may impose such conditions in connection therewith as seem just.[1] The court is not limited in respect of time in the matter of the removal of the receiver, but may act thereon whenever it seems proper and at any stage of the litigation.[2] Thus, when the receiver's security is insufficient, the court may remove him summarily and direct the delivery of all the assets to his successor, if he neglect or refuse to procure additional sureties.[3] So, also, where it subsequently appears that the appointment of the receiver was improvidently made, the court may unquestionably vacate the appointment, and thus remove the receiver;[4] and that too, even where the plaintiff's action has been dismissed and there is pending a motion for a new trial.[5] But the court may properly require, as a condition precedent to an order vacating the appointment, that the receiver's expenses and compensation be provided for by the moving party.[6]

In New York the rules regulating the removal of receivers in certain classes of cases are prescribed by statute, and, in the cases of receivers of corporations, the attorney-general is given extensive powers.[7] A receiver may be removed for discrimination in rates between rival shippers.[8] The recognition in one court of the receiver of another being by comity alone, there is no sufficient reason why receivers appointed by a federal court in one State may not be removed for good cause by a similar court in another State, as to all the property within the jurisdiction of the court which causes the removal, especially if the application is made in a proceeding to foreclose a mortgage which is a prior lien to the one being foreclosed in the suit in which the receivers were appointed, and notwithstanding that their appointment had been confirmed in ancillary proceedings.[9]

1 Shackelford's Adm'r v. Shackelford, 32 Gratt. 481; Ferry v. Bank of Central New York, 15 How Pr. 445, 458.

2 In re Colvin, 3 Md. Ch. 300; Crawford v. Ross, 39 Ga. 44; Siney v. New York Consolidated Stage Co. 23 How. Pr. 481; S. C. 16 Abb. Pr. 435.

3 Shackelford's Adm'r v. Shackelford, 32 Gratt. 481.

4 Copper Hill Mining Co. v. Spencer, 25 Cal. 11, 16.

5 Copper Hill Mining Co. v. Spencer, 25 Cal. 11, 16

6 McCarthy v. Peake, 9 Abb. Pr. 164. In this case there were two actions between the same parties and in reference to the same property, pending at the same time in different courts, and the motion to stay proceedings and to vacate the order of appointment in the later suit was granted upon the condition named in the text: Beach on Receivers, § 775.

7 N. Y. Laws of 1880, ch. 537, § 3, as amended by N. Y. Laws of 1883, ch. 378, § 7.

8 Handy v. Railroad Co. 31 Fed. Rep. 689.

9 Atkins v. Wabash etc. R'y Co. 20 Fed. Rep. 161.

§ 721. **Discharge.**—The final discharge of the receiver, like his appointment or removal, is, in general, a matter which addresses itself to the discretion of the court. It is not, therefore, usually

a matter of right. It is also a general rule that the court to which the application for an order of discharge must be made, is the court of which the receiver is an officer.[1] A modification of this doctrine has grown up in the American practice, out of the power of removal exercised by the United States courts. Thus, where, in an action pending in a State court, a receiver has been appointed, and then, before any motion to discharge has been made, the case is removed into the United States court, the motion for the discharge may be made in that court at any time after the record is filed.[2] And it has been held that failure to serve a notice of motion for a discharge of the receiver is an irregularity not affecting the merits of the motion, and, accordingly, not of sufficient importance to justify reversal, upon appeal, of an order discharging the receiver.[3] In England, if the balance in the hands of the receiver on the accounting prior to his discharge, be directed to be paid into court, the same order may direct his recognizances to be vacated, but, if it be directed to be paid in any other manner, a second petition is necessary.[4] Under the English practice the receiver is not entitled to a hearing on a motion for his discharge, the reason being that he is an officer of the court and not interested in the appointment except to carry out the duties of the office in an impartial manner.[5] And a plaintiff who has procured the appointment of a receiver cannot dismiss his bill and have the receiver discharged without first requiring him to pass his accounts.[6] The trusteeship of the receiver, however, will cease upon his discharge and the payment or de-

livery over by him of the property in his hands pursuant to the order of the court appointing him.[7]

1 See Beach on Receivers, § 793, for a statement of the law when the discharge of the receiver is not strictly a matter of discretion.

2 Texas and St. Louis R'y Co. v. Rust, 17 Fed. Rep. 275, citing Dillon on Removals, § 80, p. 99; Mahonoy Mining Co. v. Bennett, 4 Sawyer, 289.

3 Coburn v. Ames, 57 Cal. 201.

4 Lawson v. Ricketts, 11 Beav. 627.

5 Herman v. Dunbar, 23 Beav. 312.

6 White v. Lord Westmeath, 2 Hogan, 33.

7 Hovey v. Elliott, 53 N. Y. Super. Ct. 331. In Ryan v. Anglesea R. R. Co. (N. J. Feb. 1888) 10 Central Rep. 887, it was held that where the receiver of an insolvent corporation has parted with all the property which he held in that capacity, to the complainant in a suit to foreclose a mortgage against the corporation, and is made a party defendant to such suit and called upon to answer, it is his duty to answer. Until such receiver has been discharged from the receivership by the court, he will be deemed to still represent the interests committed to his care, so as to justify him in setting up, as a defense in protection of those interests, the absence of consideration for complainant's claim. *Cf.* Herring v. N. Y., L. E. & W. R. R. Co. 19 Abb. N. C.

§ 722. The receiver must be discharged upon payment by the defendant of the amount found to be due.—In a case where the complainants sought to foreclose a mortgage, with a view to make their debt, and the owner of the equity of redemption came forward, and offered to pay the debt, or all of it that was due, provided his property, which was in the custody of the court, should then be restored to his possession, and the court below refused to make an order of restoration, it was said by Justice MILLER, of the Supreme Court of the United States, on the appeal: "While the parties to this suit were fiercely litigating the amount of the mortgage debt and questions of fraud in the origin of that debt, the appointment, or the discharge, of a receiver for the mortgaged property very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon

by the circuit court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the circuit court. It is a right which the party can claim, and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it. A refusal is error—judicial error—which this court is bound to correct when the matter, as in this instance, is fairly before it." [1]

1 Milwaukee etc. R. R. Co. v. Soutter, 2 Wall. 510, 521.

§ 723. **An order by consent vacating an appointment should not make reservations.**—Where, upon the motion of defendant, consented to by the plaintiff, to vacate an order of appointment, an order was entered partly granting and partly refusing it, by requiring the receiver to restore the railroad, its appurtenances, and management to the company, but also requiring him to continue to receive and disburse its earnings and incomes, the appellate court reversed and set aside the order, on the ground that, as the motion was concurred in by all the parties in interest, the order should manifestly have included the receipt and disbursement of its future earnings.[1]

1 L'Engle v. Florida Central R. R. Co. 14 Fla. 266; Beach on Receivers, § 314.

§ 724. **Disposition of the property upon discharge.**—Where, on hearing, a receiver is discharged, and the land in his possession restored to those from whom he received it, the rents which

accrued while he held it should be returned to those who would have taken them if he had not interfered, even though they be insolvent.[1] Property left in the hands of a receiver after a bill has been dismissed for want of jurisdiction, ought to be restored to the party from whom the receiver took it, though the opposite party may have a just claim to the possession, by reason of having purchased and been put into possession before the bill was filed.[2] Affidavits, though taken *ex parte*, whether previously filed in the case or not, may be considered on a motion to dispose of property remaining in the hands of a receiver after the bill has been passed.[3]

1 Caswell v. Bunch, 77 Ga. 504.
2 Caswell v. Bunch, 77 Ga. 504.
3 Caswell v. Bunch, 77 Ga. 504.

[redacted]

I

[redacted]

[redacted] subscriptions to stock.

[redacted] –The receiver's discretion in certain

[redacted] pledged to him as indemnity against liability on account of a debt of the railroad.

[redacted] appointed by the courts of the United States under the statute of March 3, 1887.

§ 747. Of the right to employ counsel—Compensation of counsel.
§ 748. Of the receiver's right to compensation for his services.

III.

§ 749. Of the right to borrow money and to issue receiver's certificates—For what specific purposes certificates may be issued—(a). In general.
§ 750. (b). For operating expenses, equipment, and repairs.
§ 751. (c). For the payment of debts due employees, and for material and supplies, incurred prior to the receivership.
§ 752. (d). For completing an unfinished road.
§ 753. The priority of the lien created by the certificates.
§ 754. The order authorizing the issue can be made only upon notice to all parties in interest.
§ 755. The same subject, continued—Express consent of the parties in interest, not essential.
§ 756. The order authorizing the issue of certificates, strictly construed.
§ 757. An order authorizing an issue of certificates pending an appeal, is subject to review.
§ 758. The non-negotiability of receivers' certificates.
§ 759. The invalidity of certificates issued irregularly, or without consideration.

IV.

§ 760. Of the receiver's liability—(a). In his official capacity.
§ 761. (b), In his private capacity.
§ 762 The same subject, continued—Breach of trust.
§ 763. To what court the receiver is amenable.
§ 764. The same subject, continued—Effect of the Removal of Causes and Interstate Commerce Acts.

I.

§ 725. Introduction.—The receiver, being an officer of the court, is not to be regarded, in any sense, as the agent or representative of either party to the action.[1] It is his duty to exercise his function to the best of his ability in the interest of all parties alike, and it is his privilege to act independently, without control by any one of them.[2] The fund or property is to be regarded as *in custodia legis*,[3] and the receiver as the creature or of

ficer of the court, having only such powers as are expressly conferred upon him by the order of appointment, or such as are conferred upon him by the established rules and usages of a court of chancery.[4] Beyond such action as is necessary to protect the property, the court will not exercise its power on behalf of the company. It will not order a meeting of stockholders, called for the election of officers, to be postponed on the ground that it was called by mistake and contrary to the by-laws of the corporation.[5]

1 Matter of Burke, 1 Ball & B. 74; Fairfield v. Weston, 2 Sim. & St. 98; Bryan v. Cormick, 1 Cox, 422; Field v. Jones, 11 Ga. 413; Broad v. Wickham, 1 Smith's Chan. Prac. 500; Angel v. Smith, 9 Ves. 335; Curtis v. Leavitt, 1 Abb. Pr. 274; S. C. 10 How. Pr. 481; Lottimer v. Lord, 4 Smith E. D. 183; Davis v. Duke of Marlborough, 2 Swanst. 125.

2 Iddings v. Bruen, 4 Sand. Ch. 417.

3 Portman v Mills, 8 Law J. (N. S.) Ch. 161; Delany v. Mansfield, 1 Hogan, 234.

4 Booth v. Clark, 17 How. 322; Green v. Bostwick, 1 Sand. (N. Y.) Ch. 185; Skinner v. Maxwell, 66 N. C. 45; 68 N. C. 400; Battle v. Davis, 66 N. C. 252; Coburn v. Ames, 57 Cal. 301; Hunt v. Wolfe, 2 Daly, 303; Corey v. Long, 43 How. Pr. 497; S. C. 12 Abb. Pr. N. S. 427; Devendorf v. Dickinson, 21 How. Pr. 275; Ellicott v. Warford, 4 Md. 80; Hooper v. Winston, 24 Ill. 353; Kaiser v. Kellar, 21 Iowa, 95; Chautauque Co. Bank v. White, 6 Barb. 569; Verplanck v. Mercantile Insurance Co. 2 Paige, 438, 452; 1 Grant's Chan. Prac. (2nd ed.) 298; Beach on Receivers, § 2.

5 Taylor v. Philadelphia etc. R. R. Co. 7 Fed. Rep. 381.

§ 726. The receiver holds the property for the benefit of all parties until after the decree. Though a receiver may be, and generally is, appointed upon the application of but one of the parties interested in the property which he is to preserve, his holding is not merely for the benefit of that party, or of any other party; it is the holding of the court for the equal benefit of all persons who may be finally adjudged by the court to have rights in it.[1] While it may be said, as a general rule, that a receiver is not appointed for the benefit of

strangers to the suit,[2] yet his appointment enures to the benefit not only of the party at whose instance the court exercises the jurisdiction, or of the other parties of record in the event of their success in the action, but also of all parties who may at any stage of the proceedings establish a right in or to the subject-matter of the suit.[3] Thus, where there are conflicting claimants of a trust fund, who are prosecuting separate suits in the same court, the appointment of a receiver in one of the suits, on the motion of the plaintiff in that suit, will enure to the benefit of the plaintiff in the other suit, upon the establishment of his superior right to the fund, and he may have an order in his own suit for the settlement of the receiver's accounts, and a decree against him for the amount found to be in his hands.[4] When the rights of the parties have been established, he is considered as holding for the benefit of the parties entitled to the property.[5] Upon a decree for the plaintiff, the receiver's duties, as such, are at an end, and he holds merely as his trustee. To entitle the plaintiff to the property, he should make a demand with a certified copy of the decree with his receipt on it.[6]

1 First Nat. Bank v. Barnum Wire & Iron Works, 60 Mich. 487; S. C. 53 Mich. 315 (1885); Delaney v. Mansfield, 1 Hogan, 234.

2 Howell v. Ripley, 10 Paige, 43.

3 Delaney v. Mansfield, 1 Hogan, 234; Skip v. Harwood, 3 Atk. 564; In re Colvin, 3 Md. Ch. 278; Elliott v. Warford, 4 Md. 80; Iddings v. Bruen 4 Sand. Ch. 417; Leach on Receivers, § 4.

4 Beverley v. Brooke, 4 Gratt. 187.

5 In re Colvin, 3 Md. Ch. 278.

6 Very v. Watkins, 23 How. 469; Beach on Receivers, § 252.

§ 727. **Of the receiver's title.**—The receiver must, in general, be held to have title, otherwise

he will not be able to execute his trust, which may necessitate a transfer and a revesting of the original title. The possession of the receiver is that of the court of which he is the ministerial officer. Thus it is that, inasmuch as the receiver is merely an officer of the court appointing him, property in his possession is said to be in the custody of the law.[1] His possession, as an officer of the court of chancery, has been likened to that of the sheriff as an officer of a court of law, when he has taken possession of property under an execution or attachment.[2] And it is said to be immaterial in this respect that the receiver appointed declines to act, the property being notwithstanding in the custody of the law.[3] His possession is not technically adverse to that of either party to the litigation.[4]

1 De Visser v. Blackstone, 6 Blatchf. 235; Robinson v. Atlantic & Great Western R'y Co. 66 Pa. St. 160; Angel v. Smith, 9 Ves. 335; Ohio etc. R. R. Co. v. Fitch, 20 Ind. 498; Ellicott v. Warford, 4 Md. 80; Albany City Bank v. Schermerhorn, 9 Paige, 372. *Cf.* Covell v. Heyman, 111 U. S. 176.

2 In re Merchants' Insurance Co. 3 Biss. 165, per BLODGETT, J.

3 Skinner v. Maxwell, 68 N. C. 400; Beach on Receivers, § 221.

4 Ellicott v. Warford, 4 Md. 80; Mays v. Rose, Freeman (Miss.), 703; Angell v. Smith, 9 Ves. 335. *Cf.* Lee v. Cone, 4 Coldw. 302.

§ 728. **Of the receiver's possession.**—The power of a receiver to "take" property implies a correlative duty on the part of any one having it in possession to deliver it to him, and such holder violates the law in resisting the exercise of the lawful authority of the receiver. In such case the receiver may call upon the sheriff and his deputies to aid in enforcing his authority.[1] A mortgagee has no equitable right growing out of his mortgage lien to have a receiver of the estate of the mortgagor beyond the property embraced in the mortgage; nei-

ther should the receivership be extended to other property in the possession of, and claimed by, third persons.[2] For example, a receiver cannot take possession of bonds which the corporation, while yet solvent, had ordered to be distributed among its stockholders, but which are held temporarily by trustees to secure parties who had executed an indemnity bond to discharge certain liabilities likely to arise within five years.[3] Where a receiver is appointed for the benefit of a railway company and its creditors, no part of the expenses of the receivership is chargeable against the property of another railroad company, leased by the insolvent company, the receivership not being for the benefit of the lessor or its creditors.[4] But it has been held that a receiver may take possession of the property of a corporation, apparently separate and distinct from the insolvent company, upon its being shown that all its stock is held by directors of the insolvent company, and that they received the funds to pay their subscriptions from the latter, which also advanced the money to construct the lines of the former corporation, assuming entire control of them, appropriating all the revenue therefrom, and keeping no account thereof with their nominal owner.[5] So far as applications for receivers made in suits to foreclose mortgages upon railroads are made in order to obtain possession of the property covered by the mortgage, they may be considered as proceedings *in rem*. Inasmuch as the right of a receiver, appointed in such a proceeding, to the property of the corporation cannot be greater than that of the bondholders secured by the mortgage, and is, in fact, their right, he can only obtain possession of

the property which was specifically mortgaged, and is the object of the proceedings.[6]

1 State v. Rivers, 66 Iowa, 653, 656. In Iowa, one who resists the receiver by refusing possession may, by virtue of a statute, be indicted.
2 State v. Jacksonville etc. R. R. Co. 15 Fla. 201, 280.
3 Heman v. Britton, 14 Mo. App. 121.
4 Brown v. Toledo etc. R. R. Co. 4 R'y & Corp. Law J. 303
5 Day v. Postal Telegraph Co. 66 Md. 354.
6 Noyes v. Rich, 52 Me. 115; Beach on Receivers, § 357.

§ 729. **Of interference with the receiver's possession.**—(*a*). **In general.** — Since the receiver's possession is that of the court appointing him, any attempt to disturb it without leave of the court is a contempt of court, and may be punished accordingly.[1] And if a receiver, in the discharge of his duty, be threatened with violence, or actual violence be committed upon him, the court will attach the wrongdoer.[2] Where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect his possession, not only against violence, but also against suits at law. But if the property is in the possession of a third person, under a claim of title, the court will not protect the officer who attempts, by violence, to obtain possession, any further than the law will protect him, his general authority being unquestioned.[3] A sale of property under execution without leave of the court, while the property is in possession of a receiver, is illegal and void, although the levy was made before the appointment. The execution creditor should bring his lien to the notice of the court appointing the receiver, and ask to have the execution satisfied out of the proceeds of the property.[4]

1 *Moore v. Mercer etc. Co* — N. J. —; 4 R'y & Corp. Law J. 563; Beverley v. Brooke, 4 Gratt. 187, 211; Noe v. Gibson, 7 Paige, 513; Hull v. Thomas, 3 Edw. Ch. 236; De Nisser v. Blackstone, 6 Blatchf. 235; Secor v. Toledo etc. R'y Co. 7 Biss. 513; King v. Ohio etc. R.R. Co. 7 Biss. 529; Beverley v. Brooke, 4 Gratt. 211; Spinning v. Ohio Life Ins. & Trust Co. 2 Disney, 308; Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. 46 Vt. 792; Langford v. Langford, 5 Law J. N. S. Ch. 61; Broad v. Wickham, 4 Sim. 511; Skip v. Harwood, 3 Atk. 564; Anonymous, 2 Mod. 493; Beach on Receivers, § 237.

2 Fitzpatrick v. Eyre, 1 Hogan, 171. *Vide infra*, "STRIKES," § 730.

3 Parker v. Browning, 8 Paige, 388; 35 Am. Dec. 717; Noe v. Gibson, 7 Paige, 513.

4 Walling v. Miller, 103 N. Y. 173, 177; 2 Am. St. Rep. 400, and note upon EXECUTION AGAINST PROPERTY IN HANDS OF RECEIVER.

§ 730. (*b*). **By violence or threats—"Strikes."** While the employees upon a railroad in the hands of a receiver cannot be compelled by the court having the road in custody to remain in his service, neither they, nor the "brotherhood" to which they belong, will be permitted to interfere with or disturb him or his subordinates in the possession and operation of the property.[1] Thus, it has been held that where the employees of a railroad company whose property is in the custody of the court, by concert of action, quit work, and take possession of and obstruct the movement of engines and cars on the tracks of the company, and, while so doing, also take possession of, or obstruct the operation of engines or cars in the custody of the receivers, it is the right and duty of the court to punish the latter acts by proceedings in contempt. If, however, they are engaged in a lawful undertaking and the interference is not intentional, the court will not be tenacious of its prerogative; otherwise, if the undertaking be unlawful, even if they intend no contempt.[2] Inducing employees, by persuasion or argument, to leave the service of a road in possession of a receiver is not a contempt of court; but if the object is accomplished by threats or

violence, or by overawing them by preconcerted demonstrations of force, the perpetrators may be punished as for a contempt.[3] It is immaterial whether the interference comes in the way of actual violence or by intimidation and threats, or whether from within or from without.[4] Accordingly, when the employees of another road had "struck" and, by intimidation and violence, prevented the employees of the receiver from working, they were tried, in a summary manner, as for a contempt committed in the actual presence of the court, and duly punished by imprisonment.[5]

1 Beers v. Wabash etc. R'y Co. 34 Fed. Rep. 244.
2 In re Doolittle, 23 Fed. Rep. 544; Beach on Receivers, § 267.
3 United States v. Kane, 23 Fed. Rep. 748.
4 In re Higgins, 27 Fed. Rep. 443.
5 Secor v. Toledo etc. R. R. Co. 7 Biss. 513; King v. Ohio etc. R. R. Co. 7 Biss. 529. See, also, Beach on Receivers, §§ 263, 267.

§ 731. (c). **By suit.**—A receiver cannot be sued in his official character in any State or federal court, other than that by which he was appointed, except with the consent of that court; and the granting or refusing of that consent rests in the discretion of the court.[1] It rests in the discretion of the court to allow a party claiming rights against its receiver, to bring an independent action against him, or to compel the claimant to proceed against him by petition in the action in which he is receiver.[2] Although there may be a superior title, and that plainly appearing, the court must first be applied to for leave to sue.[3] If a receiver, duly appointed and in possession of the property in controversy, be sued without the leave of the court appointing him first obtained, the parties who

bring the suit may be subjected to proceedings in contempt of court and punished accordingly.[4] The proceedings in a suit so brought will generally be restrained by injunction,[5] or stayed or set aside on motion.[6] If the party bringing suit be within the jurisdiction of the court which appointed the receiver, he will be restrained by injunction from prosecuting his suit, even though it be in a foreign jurisdiction, the proceeding being against him personally, and not against the court whose authority he has invoked. Disobedience of the injunction will subject the offender to proceedings in contempt.[7] Leave to institute actions against receivers, is usually granted by the courts, unless it appears clearly from the application of the claimant that his demand has no legal foundation; the petition should, therefore, show a probable cause of action—one demanding adjudication by proceedings in court.[8] An order of restraint granted on a bill to which a receiver is defendant, by the court which appointed him, is an implied leave to bring suit against that receiver.[9]

1 Reed v. Axtell & Myers (receivers Richmond etc. R. R. Co.), 84 Va. 231; Davis v. Gray, 16 Wall. 203, 218, and cases cited; Barton v. Barbour, 104 U. S. 126 (affirming S. C. 3 McAr. 212), in which it was held, that the rule applies to suits against a receiver on a money demand, or for damages, as well as to those the object of which is to recover property from the possession of the receiver; Thompson v. Scott, 4 Dill. 508; Kennedy v. Indianapolis C. & L. R. R. Co. 3 Fed. Rep. 97; S. C. 2 Flip. 704; *Parker v. Browning*, 8 Paige, 388; 35 Am. Dec. 717; DeGroot v. Jay, 30 Barb. 483; S. C. 9 Abb. Pr. 364; Taylor v. Baldwin, 14 Abb. Pr. 166; Miller v. Loeb, 64 Barb. 454; *Little v. Dusenberry*, 43 N. J. 614; S. C. 50 Am. Rep. 445; Angell v. Smith, 9 Ves. 335; Brooks v. Greathead, 1 Jacob & W. 176; Randfield v. Randfield, 3 De Gex, F. & J. 766, reversing S. C. 1 Drew. & S. 310; Searle v. Choate, 25 Ch. Div. 723; Tink v. Rundle, 10 Beav. 318; Evelyn v. Lewis, 3 Hare, 472; In re Persse, 8 Ir. Eq. 111; Parr v. Bell, 9 Ir. Eq. 55; Andrews v. Stanton, 13 Bradw. 133, 163; Mc endy v. Barbour, 78 Va. 544; Rogers v. Mobile and Ohio R. R. Co. 16 Rep. 533 (Tenn. 1833); Graffenreid v. Brunswick and A. R. R. Co. 57 Ga. 22; Henderson v. Walker, 55 Ga. 481; Wray v. Hazlett, 6 Phila. 155; Keen v. Breckenridge, 96 Ind. 69; Meredith etc. Savings Bank v. Simpson, 22 Kan. 414; Payne v. Baxter, 2 Tenn. Ch. 517; Heath v. Missouri K. & T. R. R. Co. 83 Mo. 617, 623.

2 Central Trust Co. v. Wabash, St. Louis etc. R. R. Co. 23 Fed. Rep. 818; Kennedy v. Indianapolis C. & L. R. R. Co. 3 Fed. Rep. 97; S. C. 2 Flip. 704; Melendy v. Barbour, 78 Va. 544; Beach on Receivers, § 654.

3 Moore v. Mercer etc. Co. (N. J.) 4 R'y & Corp. Law J. 563, citing Noe v. Gibson, 7 Paige, 513; Angel v. Smith, 9 Ves. 335; Brooks v. Greathead, 1 Jacob & W. 178; Beach on Receivers, §§ 213, 224, 225; 2 Daniell Ch. Pr. 1743, 1744.

4 Wiswell v. Sampson, 14 How. 65, 66, 67; Naumburg v. Hyatt, 24 Fed. Rep. 898; Kennedy v. Indianapolis C. & L. R. R. Co. 3 Fed. Rep. 97; Thompson v. Scott, 4 Dill. 508, wherein there is a full discussion of the question concerning leave to sue receivers; Express Co. v. Railroad Co. 99 U. S. 191, 198; DeGroot v. Jay, 30 Barb. 483; S. C. 9 Abb. Pr. 364; Taylor v. Baldwin, 14 Abb. Pr. 166; Davis v. Gray, 16 Wall. 203, 218, and cases cited.

5 Evelyn v. Lewis, 3 Hare, 472; Tink v. Rundle, 10 Beav. 318; In re Persse, 8 Ir. Eq. 111; Parr v. Bell, 9 Ir. Eq. 54; Kennedy v. Indianapolis C. & L. R. R. Co. 3 Fed. Rep. 97.

6 DeGroot v. Jay, 30 Barb. 483; S. C. 9 Abb. Pr. 364; Taylor v. Baldwin, 14 Abb. Pr. 166.

7 Vermont etc. R. R. Co. v. Vermont Central R. R. Co. 46 Vt. 792; S. C. affirmed, 50 Vt. 500. See this case and Langdon v. Vermont etc. R. R. Co. 53 Vt. 228; S. C. 54 Vt. 593, as to the effect of a decree by consent terminating a receivership over a railway, the receivers still continuing in possession of and operating the road as managers; Andrews v. Smith, 5 Fed. Rep. 833, as to their liability to an accounting in a subsequent action by mortgage bondholders in a federal court, and the effect of a plea to such action of the pendency of the former proceedings in the State court; Middleton v. New Jersey West Line R. R. Co. 25 N. J. Eq. (10 Green C. E.) 306, as to the right or power of the receiver of a railway company, under the laws of New Jersey, to sell the property, rights and franchises of the company, free from liens and encumbrances.

8 Jordan v. Wells, 3 Woods, 527; Randfield v. Randfield, 3 De Gex, F. & J. 766; *Hills v. Parker*, 111 Mass. 508; 15 Am. Rep. 63.

9 Alspaugh v. Adams, 80 Ga. 345.

§ 732. The same subject, continued—Leave to sue a receiver in another court.—As a general rule, leave to sue a receiver in any court other than the one which appointed him will not be granted; it is only when special facts and circumstances are shown to exist that the court will allow suit to be so brought.[1] An application to compel a receiver to pay a tax on property in his possession must be made in the action in which he was appointed.[2] When it appears that the question to be determined is a necessary part of the original controversy, there is an especial reason for refusing leave to sue in another court, for otherwise

there might be presented serious questions of conflicting authority. The proper course is by intervention in the original suit.[3] On application for leave to sue a receiver on a note in another county than that of his appointment, an indorsement by the judge that "the party can sue if he chooses, but there is no earthly occasion for it, because the receiver has instructions to pay all debts, and to sell property to supply the money demand on him," does not amount to a consent to the suit.[4] It is said to be no jurisdictional bar to a suit at law upon a tort, against receivers appointed by the court of chancery, that leave to prosecute was not first obtained of that court;[5] and under other circumstances, a court appointing a receiver will sometimes permit a person having a claim against the company to enforce it by means of independent proceedings at law. Thus, in England, the holder of a rent-charge has been allowed leave to distrain, notwithstanding the appointment of a receiver;[6] the court saying: "The receiver was not appointed for the purpose of keeping persons out of their rights, and in making this order I express no opinion as to the legal rights of the applicant, but simply remove out of his way the difficulty of the officer of the court being in possession." But, in the same controversy, after the railway company had, by deed, conveyed their superfluous land and chattels in trust for the benefit of creditors, the court refused to allow distraint either upon the property so conveyed or upon the locomotives used in the operation of the road.[7] If a federal court in equity grant permission to sue a receiver for damages for personal injuries, the permission does

not confer jurisdiction upon the court on its law side to entertain the case, if, otherwise, it have no jurisdiction—as, *e. g.*, on account of the citizenship of the parties. The permission relates to the court in equity only.[8]

1 In re Platt, 52 How. Pr. 468; Meredith Village Savings Bank v. Simpson, 22 Kan. 414.

2 In re Mallery, 50 Hun, 601.

3 Central Trust Co. v. Wabash etc. R. R. Co. 23 Fed. Rep. 858.

4 Piper v. Stratten (Texas, 1888).

5 Town of Roxbury v. Central Vermont R. R. Co. 60 Vt. 121, reaffirming Lyman v. Railroad Co. 59 Vt. 167.

6 Eyton v. Denbigh etc. R'y Co. 37 Law J. Ch. 669; S. C. Law R. 6 Eq. 488; 1 Hodges on Railways, (7th ed.) 161, 162.

7 Eyton v. Denbigh etc. R'y Co. Law R. 6 Eq. 488.

8 Palmer v. Scriven, 21 Fed. Rep. 354; Beach on Receivers, § 658.

§ 733. The same subject, continued. — When leave to sue not necessary.—Leave to sue a receiver is not necessary in suits for property not rightfully in his possession, nor in those based on unofficial acts.[1] The general rule, as stated in the foregoing section, does not apply to suits against receivers appointed by the United States courts in respect to their acts or transactions in carrying on the business connected with the property in controversy.[2] Under a statute in South Carolina, directing the comptroller-general of the State to take possession of a railway whenever there was default for six months in the payment of interest upon its debt which had been guaranteed by the State, it was held that the fact that the possession of the road had been given to a receiver by a decree of court upon the petition of creditors, was no bar to proceedings by the comptroller-general under the act, and that the exercise of his power did not impair the obligation of the contract be-

tween the State and the holders of the guaranteed bonds.[3] And in Indiana it has been held that when a receiver answers the complaint, without objecting that the plaintiff failed to obtain leave to sue him, he cannot afterward object that the complaint does not aver that leave was obtained.[4] In New York, it has been held that if the court does not interfere by setting aside or staying the proceedings in a case brought against a receiver without leave, or by punishing the parties suing for a contempt, the action will be considered regular and a judgment therein will be valid.[5] But, as has been said by an able writer, "it is difficult to see how this exemption from liability to suit without leave can be considered a privilege so personal to the receiver that he may waive it. In reality, it is the barrier which the court itself interposes against unwarranted interference with its own officers, and against depredations upon the estate which is in its own charge and custody."[6] A temporary receiver appointed in proceedings instituted by the attorney-general to dissolve a corporation on the ground of insolvency, is not a necessary party to a foreclosure suit brought by the mortgage creditors of the company; for as temporary receiver he is not vested with the title to the property of the corporation, and it is not divested of its property until final judgment of dissolution and the appointment of a final receiver.[7] So long as the receiver's possession is not disturbed or questioned, parties may litigate, in the same court or elsewhere, questions concerning the ultimate right and title to the property;[8] for a receiver is not disturbed in his possession by other courts acting after his a-

pointment.[9] Where the order of the New York superior court appointing a receiver provides that nothing therein contained shall affect the right of any receiver theretofore appointed over any property of defendant to act in accordance with the powers and duties conferred upon him, it does not conflict with a previous order of the supreme court appointing a receiver of defendant's property.[10]

1 *Hills v. Parker*, 111 Mass. 508; 15 Am. Rep. 63. But see a *dictum contra*, in Barton v. Barbour, 104 U. S. 126, 128.

2 Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice": Act of March 3, 1887, Removal of Causes, § 3 U. S. Stat. 1886-1887, 552.

3 Ex parte Dunn, 8 S. C. 207.

4 Elkhart Car Works Co. v. Ellis, 113 Ind. 215.

5 Hackley v. Draper, 4 Thomp. & C. 614, 631, affirmed 60 N. Y. 88.

6 H. Campbell Black, Esq., in 25 Am. Law Reg. (N. S.) 289, 300. In this readable article Mr. Black has discussed the law relating to suits by and against receivers with considerable acuteness.

7 Herring v. New York etc. R. R. Co. 105 N. Y. 340, 371.

8 The Holliday Case, 27 Fed. Rep. 830, 843.

9 Blake v. Alabama & C. R. R. Co. 6 Nat. Bank. Reg. 331; Keep v. Michigan L. S. R. R. Co. 6 Chicago Leg. News, 101; Sedgwick v. Menck, 6 Blatchf. 156; S. C. 1 Nat. Bank. Reg. 675; Alden v. Boston, H. & E. R. Co. 5 Nat. Bank. Reg. 239; Bill v. New Alb. R. R. Co. 2 Biss. 390; Union Trust Co. v. Rockford, R. I. & St. L. R. R. Co. 7 Chicago Leg. News, 33; Storm v. Waddell, 2 Sand. Ch. 494; Hutchinson v. Green, 6 Fed. Rep. 833; Spinning v. Ohio L. Ins. & Tr. Co. 2 Disney, 336; May v. Printup, 59 Ga. 129; Eisenmann v. Thill, 1 Cin. Super. Ct. 188; Bruce v. M. & K. R. R. Co. 1 Fed. Rep. 342; Beecher v. Bininger, 7 Blatchf. 170; In re Clark v. Bininger, 4 Benedict, 88; Conkling v. Butler, 4 Biss. 22; Mercantile Trust Co. v. Lamoille Valley R. R. Co. 16 Blatchf. 324; Beach on Receivers, § 20.

10 Thaw v. Bankers' etc. Tel. Co. 24 Jones & S. 588.

II.

§ 734. Of the receiver's rights and duties. It may be said, in a general way, that a receiver has no powers except such as are conferred upon him by the order by which he is appointed, and by

the practice and usage of the court.[1] He is merely an officer of the court; his appointment determines no right, and in no way affects the title to the property; his holding is the holding of the court, and he has no right to ask for a revision of the order removing him, any more than a stranger to the cause.[2] He is but a minister, and therefore has not the discretionary power of a person acting in a fiduciary character; nor can he do any single act likely to seriously diminish the fund without special leave of court.[3] In theory, the court itself has the care of the property in his hands, for the benefit of the party or parties ultimately entitled to it.[4] He is not, however, merely the assignee of him whose property is placed in his care,[5] but he may exercise such powers, in dealing with the property, as belong to a receiver according to the practice of the court of chancery, and in addition thereto, such special powers as are particularly conferred upon him by the order of his appointment. In the absence of specific, detailed authority over the property, the duties of the receiver are such as are imposed by the law, namely, to take charge of the property and safely keep it, subject to the further order of the court.[6] A court of equity possesses the power to make all necessary orders for the control of receivers appointed by it.[7] And he has a right to apply to the court for instructions in relation to the funds when a question arises as to what may be his duty under its orders.[8]

1 Grant v. Davenport, 18 Iowa, 179; Verplanck v. Mercantile Ins. Co. 2 Paige, 452; In re Colvin, 3 Md. Ch. 278.

2 In re Colvin, 3 Md. Ch. 278.

3 Hooper v. Winston, 24 Ill. 353.

4 Devendorf v. Dickinson, 21 How. Pr. 275, 276.

5 King v. Cutts, 24 Wis. 627.

6 Demain v. Cassidy, 55 Miss. 320, 322.

7 Jennings v. Simpson, 12 Neb. 558; Guardian Savings Institution v. Bowling Green Savings Bank, 65 Barb. 275.

8 Curtiss v. Leavitt, 1 Abb. Pr. 274; Beach on Receivers, § 259.

§ 735. Of his right to sue.—As a general rule, all rights of action which belong to the party whose property is put into the hands of a receiver, are transferred to the receiver by virtue of his appointment. He succeeds to all such rights for the purpose of enforcing them.[1] In suits instituted by him, the validity of his appointment cannot be collaterally assailed for defects in the original bill.[2] Where the order appointing a receiver authorized him to bring suits for acquiring, securing, and protecting the assets, franchises, and rights of a railway company, and for securing and protecting the land grant and land reservation of the company, it was held by the Supreme Court of the United States that he could maintain a bill against the officers of a State to enjoin them from granting to other persons lands which the State had granted to the company, and which it had declared to be forfeited.[3] A receiver of a corporation represents the rights both of creditors and stockholders, and may assert their rights when affected by the fraudulent or illegal acts of its managing directors; he may repudiate illegal transfers of the corporate effects, and illegal contracts made by the officers of an insolvent corporation, in its name, and professedly on its behalf.[4] So, he may bring a suit in equity to recover back from its officers assets which they have converted, and the officers will not be heard to say that such assets are not needed for the payment of lawful debts of the corporation.[5] But un-

der an order appointing a receiver pending foreclosure, and authorizing him to sue as he might be advised, he cannot sue for a decree declaratory of the rights of the mortgagee and other lien-holders in the property, and to obtain possession thereof, the latter relief being in the nature of an ejectment, of which equity has no cognizance, even though plaintiff's title is not such as to afford him a remedy at law, and though the former be a proper subject for a supplemental bill in the foreclosure.[6]

1 Coope v. Bowles, 28 How. Pr. 10; S. C. 42 Barb. 87; Griffin v. Long Island R. R. Co. 102 N. Y. 449; Curtis v. McIlhenny, 5 Jones Eq. 290.

2 Comer v. Bray, 83 Ala. 217. But see Walsh v. Byrnes, 39 Minn. 527, where, although it is held that the validity of his appointment, or his authority to sue, is not ground for general demurrer for insufficiency, yet that the defendant may demur on the ground that the receiver has no legal capacity to sue.

3 Davis v. Gray, 16 Wall. 203, affirming S. C. 1 Woods, 420.

4 Leavitt v. Palmer, 3 N. Y. 19; 51 Am. Dec. 333; Gillett v. Moody, 3 N. Y. 479; State of Ohio v. Leavitt, 7 N. Y. 328; Bank Commissioners v. St. Lawrence Bank, 7 N. Y. 513; Leavitt v. Tylee, 1 Sand. Ch. 207; Leavitt v. Yates, 4 Edw. Ch. 134; Brouwer v. Hill, 1 Sand. 629; Furniss v. Sherwood, 3 Sand. 521; Austen v. Daniels, 4 Denio, 299; Beach on Receivers, § 668.

5 McCarty's Appeal, 110 Pa. St. 379.

6 Harland v. Banker's etc. Tel. Co. 33 Fed. Rep. 199.

§ 736. The same subject, continued—General leave to sue may be given in the order of appointment.—In order to avoid the necessity of frequent applications to the court for leave to bring actions, it has become customary to give the receiver, in the order by which he is appointed, a general leave to bring suits for the collection of the assets and for obtaining possession of the property over which he is to have charge;[1] and the transcript of the proceedings in the suit in which he received his appointment need not be produced to prove his authority.[2] The authority to bring suit may, however, be presumed; as, where a receiver brought,

suit in the court by which he was appointed, and prosecuted the same with its sanction, it was not considered necessary for him to produce an express order authorizing him to sue.[3] But the authority to sue conferred by the order of appointment is confined to such suits as are contemplated by the order, and to the property under the receiver's control; so, where the decree appointing a receiver authorized him to sue for all the assets of a defunct corporation, of every kind and character, it was held that he could not sue for damages for waste or injury to property not in his possession, except by order of the court.[4] An order directing the receiver to collect the property and hold it subject to the further order of the court, was held to be insufficient to authorize him to bring a suit to recover a part of the property.[5] But under a statute which made it the duty of the receiver to take charge of and sell the property, and collect the debts, and declared that he should be bound and held liable for default, negligence or malfeasance in office, it was decided that a receiver might bring an action, without a special order granting leave, upon an appeal bond which stood in the place of the property taken from his possession pending the appeal, the appeal having resulted in the confirmation of his appointment.[6] In some of the States, statutes regulating the powers of receivers authorize them to institute proceedings in prescribed cases without formal leave of court; in such cases special authority to sue from the court appointing them is unnecessary.[7] If the order of appointment does not expressly authorize a receiver to bring suits, the requisite authority may be conferred by

a subsequent order.[8] It is presumed that the receiver, being positive of the propriety of bringing an action, would hardly be authorized to discontinue it, without leave of the court.[9]

1 Beach on Receivers, § 651.
2 Helme v. Littlejohn, 12 La. An. 238.
3 Cox v. Volkert, 66 Mo. 505, 511.
4 Alexander v. Relfe, 9 Mo. App. 133, 139.
5 Screven v. Clark, 13 Ga. 41.
6 Everett v. State, 28 Md. 190.
7 Hayes v. Brotzman, 46 Md. 519.
8 Lathrop v. Knap, 37 Wis. 207.
9 Beach on Receivers, § 651.

§ 737. Of his right to sue in another court—Comity.—It is well settled in this country that receivers appointed by one jurisdiction are not entitled *as of right* to recognition in other jurisdictions, and that courts of equity cannot acquire extra-territorial jurisdiction over property by appointing receivers.[1] A receiver has no power to transfer to a foreign jurisdiction any question touching the appropriation and distribution of the assets within the jurisdiction of the court appointing him. Its right to administer them is exclusive, and the receiver cannot deprive it of its authority over him and over the fund which he holds as its officer; and in rejecting a claim based upon an order of a foreign court in ancillary proceedings, on the ground that the foreign adjudication does not constitute legal proof of the alleged indebtedness, he is to be sustained.[2] But by the comity existing between civilized states, receivers appointed by the courts of one will be recognized by the courts of others; especially is this the rule as between the united American States. But this principle of comity is

carefully restricted to cases where no vested or acquired rights of the citizens of the State extending it, will be injuriously affected.[3] An order of a California court, directing a resident member of a firm, for which a receiver had been appointed by that court, to assign to the receiver certain stock owned by the firm and to make the receiver an attorney-in-fact to transfer the stock to himself, as receiver, upon the company's books, has been recognized by a "supreme court" of New York, which directed a transfer of the shares of stock upon the books of the company to be made to the receiver.[4] The officer of a foreign corporation, upon being sued by the receiver in order to reach corporate assets, cannot plead by way of defense the legal incapacity of the corporation to transact business in the State, no complaint on the part of the latter having been made.[5]

1 Booth v. Clark, 17 How. 322; Atkins v. Wabash, L. & Pac. R'y Co. 29 Fed. Rep. 161; reported, also, as Ceutral Trust Co. v. Wabash, St. L. and Pac. R'y Co. 1 R'y & Corp. Law. J. 12.

2 Reynolds v. Stockton, 43 N. J. Eq. 211; 3 Am. Rep. 305. As to how far a foreign judgment is conclusive, see Jones v. Jones, 2 Am. Rep. 447, and note; McLaren v. Kehler, 8 Am. Rep. 591. As to when a foreign judgment is to be treated as a nullity, see Latimer v. Union Pacific R'y Co 97 Am. Dec. 378.

3 Hunt v. Columbian Ins. Co. 55 Me. 290; 92 Am. Dec. 592. See, also, Willitts v. Waite, 25 N. Y. 577; Taylor v. Columbian Ins. Co. 14 Allen, 353; *Hoyt v. Thompson*, 5 N. Y. 320, reversing S. C. 3 Sand. 416; Hoyt v. Thompson's Ex'r, 19 N. Y. 207; *Weller v. The Pace Tobacco Co.* 5 R'y & Corp Law J. 5. This question has been most frequently considered in cases where an assignment in insolvency or bankruptcy has been made in the foreign State. For a discussion of this question, see 2 Kent's Com. (13th ed.) 406, with cases cited; and see, also, Story's Conflict of Laws, §§ 419, *et seq.*; Moseby v. Burrow, 52 Tex. 396, 404, citing White v. White, 7 Gill. & J. 210; Page v. McKee, 3 Bush (Ky.), 135; Watts v. Waddle, 6 Pet. 400; Paschal v. Acklin, 27 Tex. 173; South Carolina R. R. Co. v. People's Savings Institution, 64 Ga. 13; Williams v. Hintermeister, 26 Fed. Rep. 889; JOHNSON, J., in Bank v. McLeod, 38 Ohio St. 174 (1882); Conkling v. Butler, 4 Biss. 22; Gelpcke v. Milwaukee etc. R. R. Co. 11 Wis. 454; Ohio & M. R. R. Co. v. Fitch, 20 Ind. 498.

4 *Weller v. The Pace Tobacco Co.* 5 R'y & Corp. Law J. 5.

5 Williams v. Hintermeister, 26 Fed. Rep. 889.

§ 738. Of his power and liability as to contracts made before appointment.—Money due upon contracts entered into by a railroad corporation before the appointment of receivers, and which does not constitute a lien upon the property of the company, is part of the general indebtedness of the road, and, although binding upon it, is not to be paid by the receiver. Such payment would clearly be giving a preference to creditors of equal right, and would defeat the object of foreclosure.[1] But such contracts may be carried out by the receivers if necessary, or if clearly beneficial to the trust.[2] Where one railroad company leases the property of another, agreeing to pay, as part of the rent, interest on certain mortgage bonds, non-payment of the rent and interest being a cause of forfeiture, receivers of the lessee company, appointed by the court to preserve its system intact for the benefit of the company and its creditors, are liable for the rent and interest accruing during the term of their receivership.[3] It has been held in New Jersey, where two railroad companies entered into a contract for the use by one of them of the tracks and terminal facilities of the other, and both companies afterward became insolvent, and were placed in the hands of receivers by the same court, that the contract might be modified by the court upon the application of either of the receivers, so as equitably to readjust the rates agreed upon by them for the terminal facilities and for the use of part of one road by the other company, it being shown that the modification was beneficial to one of the trusts, and not injurious to the other.[4]

1 Ellis v. Boston etc. R. R. Co. 107 Mass. 1; S. C. *sub nom.* Graham v. Boston etc. R. R. Co. 118 U. S. 161.

2 Ellis v. Boston etc. R. R. Co. 107 Mass. 1: S. C. *sub nom.* Graham v. Boston etc. R. R Co. 118 U. S. 161.

3 *Brown v. Toledo etc. R. R. Co.* 4 R'y & Corp. Law J. 333.

4 In re New Jersey etc. R'y Co. 23 N. J. Eq. 67; Beach on Receivers, § 363.

§ 739. **The same subject, continued—Stale claims.**—An order of appointment authorizing a receiver to pay amounts due and maturing for materials and supplies for the operation of the road, is construed to refer to the payment of such obligations only as are necessary to preserve the line in good running condition, and the court will refuse to direct its receiver to pay obligations which had been incurred long before his appointment, considering the rights of the mortgagees of primary importance as contrasted with them.[1] So, also, where a railroad company, before becoming insolvent, purchased a large number of locomotives and other rolling-stock, to be paid for by monthly installments, the title to which property was to remain in the vendors until the whole amount of the purchase-money should be paid, and the directors and others, in order to preserve the property for the benefit of the company and its creditors, advanced, on account of such rolling-stock, to the owners thereof, a large sum, with the understanding that they should, upon the payment of the balance, become owners of it, and hold the same for the benefit of the company until their advancement was repaid to them by the company, it was held, upon their petition to be subrogated to the rights of the vendors to the extent of their advancement, and for the payment of such amount by the receiver, that the right of subrogation could not be enforced until the whole debt was paid; that

the money which came into the receiver's hands in the management of the road constituted the only fund out of which the monthly payments to the owners of the rolling-stock were to be made, and that the petitioners' claims should not be made a lien upon the rolling-stock prior to the lien of the vendors.[2]

1 Brown v New York etc. R. R. Co. 19 How. Pr. 84.

2 Receivers of New Jersey Midland R. R. Co. v. Wortendyke, 27 N. J. Eq. 658, 662; Beach on Receivers, § 363.

§ 740. The same subject, continued—Of specific performance and the rescission of contracts.— Where, by contract, an express company made a loan to a railroad company in return for certain privileges and facilities in carrying on its business over the road, and agreed that the sums due therefor, upon monthly settlements, should be applied by the railroad company in payment of the loan, the road being afterward put in the hands of a receiver, who declined to carry out the contract, it was held, in a suit by the express company against him to enforce specific performance, that the transaction between the companies was not a license, but simply a contract for transportation, creating no lien, the specific performance whereof would be a form of satisfaction or payment, which the receiver cannot be required to make.[1] When a railroad company had, by contract, the right to run over the defendant's road, upon accounting to the defendant company, by the 15th of each month, for the month preceding, and paying the ascertained balance due defendants within ten days thereafter, and was three months in arrear, it was

held that the receiver of the defendant road had a right to sever the connection between the roads.[2]

1 Southern Express Co. v. Western N. C. R. R. Co. 99 U. S. 191.

2 Elmira Iron & Steel R. M. Co. v. Erie R'y Co. 26 N. J. Eq. 284. Beach on Receivers, § 340.

§ 741. Of the right and duty to collect subscriptions to stock.—It is not only the right, but the duty, of a receiver of an insolvent corporation to collect unpaid subscriptions to its capital stock, for the benefit of its creditors, to such an extent as may be necessary to pay their lawful claims in full.[1] In a case where the legislature of Georgia had recognized and ratified the appointment of a receiver made by the stockholders of a corporation before the forfeiture of their charter, it was held that the duty of calling in the unpaid stock, to discharge debts, devolved upon the receiver, and that if he fraudulently combined with the stockholders, and neglected or refused to do his duty, the proceeding might be maintained directly by the creditor in his own name against the stockholders, making the receiver a party defendant.[2] The receiver has the same powers, as regards stockholders, which were possessed by the corporation before he was appointed;[3] but he has no greater power than the corporation had to collect subscriptions.[4] Thus, where property has been transferred to a corporation, by arrangement, at an overvaluation, in payment for stock which has been issued as fully paid, since the transaction cannot be impeached, except for fraud upon the corporation, a receiver of the corporation appointed long after the transaction will not be allowed to maintain a suit to impeach or set it aside.[5]

As a necessary incident to his power to collect unpaid stock subscriptions, the receiver has the power to make calls upon the stockholders for such amount as may still be due, or may be required.[6] In New York, the form of action used by the receiver in enforcing his rights in this respect was formerly in equity;[7] but may now, by statute, be either at law or in equity.[8] In Mississippi it is at law.[9]

1 Beach on Receivers, § 669; Dayton v. Borst, 31 N. Y. 435; Nathan v. Whitlock, 9 Paige, 152; Frank v. Morrison, 53 Md. 423. But see Hadley v. Russell, 40 N. H. 109; Coleman v. White, 14 Wis. 700; 80 Am. Dec. 797; Umstead v. Buskirk, 17 Ohio St. 113.

2 Hightower v. Thornton, 8 Ga. 486; 52 Am. Dec. 412. See Cook on Stock & Stockh. § 238, where the subject is fully treated, and the cases collected.

3 Cutting v. Damerel, 88 N. Y. 410; Mean's Appeal, 85 Pa. St. 293. But he has no power to enforce statutory liabilities: Farnsworth v. Wood, 91 N. Y. 308.

4 Billings v. Robinson, 94 N. Y. 415, affirming S. C. 28 Hun, 122. *Cf.* Cleveland v. Burnham, 55 Wis. 598.

5 *Coffin v. Ransdall*, 110 Ind. 417; S. C. 1 R'y & Corp. Law J. 326. See, also, Scovill v. Thayer, 105 U. S. 143; Mills v. Scott, 99 U. S. 25.

6 Dane v. Young, 61 Me. 160; Hall v. United States Ins. Co. 5 Gill. 484. In this case the receiver was given the same power to make calls as was possessed by the officers of the corporation before his appointment. *Hightower v. Thornton*, 8 Ga. 486; 52 Am. Dec. 412; Johnson v. Laflin, 5 Dill. 65; Rankins v. Elliott, 16 N. Y. 377. In England, under the Railway Companies Act of 1867, a receiver has no such power: Re Birmingham etc. R'y Co. Law R. 18 Ch. Div. 155. See, also, Nathan v. Whitlock, 9 Paige, 152; Chandler v. Keith, 42 Iowa, 99.

7 Sagory v. Dubois, 3 Sand. Ch. 466.

8 N. Y. 3 Rev. Stat. ch. 8, art. 3, § 69. The remedy provided by the statute being considered cumulative: Mann v. Currie, 2 Barb. 294; Harman v. Page, 62 Cal. 448.

9 Freeman v. Winchester, 18 Miss. 577.

§ 742. Of the right to enter into new contracts. It may be considered a general rule that a receiver of a railway has no power to enter into contracts, unless he has been authorized to do so by the court. If he does, as he undoubtedly may, use the moneys belonging to the trust, for purposes connected with the trust, as he think proper, he does so upon his own responsibility, and takes the

risk that the court may not finally approve his action; he cannot bind the trust by contract, without the authority of the court.[1] Where it appears to the court controlling the management of an insolvent railroad corporation that the contracts of the receiver are so ill-advised and injudicious as to be improvident, such as contracts for materials which cannot be fulfilled within the probable period of the receivership, or in excess of the reasonably anticipated needs of the road, it will not enforce performance on the part of the receiver, nor compel the acceptance of the materials contracted for, nor award damages for non-fulfillment or for loss of profits; but the court may properly reimburse the contractor out of the trust fund for the expense incurred in good faith in making preparations for carrying out the contracts.[2]

1 Lehigh Coal etc. Co. v. Central R. R. Co. 35 N. J. Eq. 426, 429. See, also, Beach on Receivers, §§ 257, 361. *Cf.* In re Louisiana etc. Deposit Co. 40 La. An. 514.

2 Vanderbilt v. Little, 43 N. J. Eq. 663. The court were not, however, fully agreed on the grounds of decision. MAGIE, J., delivering the opinion of the court, reviews the powers of a receiver, and lays down the rules above stated. DIXON, J., was in favor of stronger support to the contracts of receivers, acting under the statutory power by which receivers of railroad companies in New Jersey are empowered to operate the road for the use of the public, subject at all times to the control of the chancellor, saying: "To hold that receivers of this class must go into the market for railroad supplies, with the understanding that the fairness of their contracts must be demonstrable to the chancellor whenever they are brought into question, or else they will not be obligatory upon the receivers, or with the understanding that, on breach of the receivers of their contracts, the other contracting parties shall only be indemnified against actual loss, and shall not have such damages as they would be entitled to recover from other delinquent purchasers, seems to me to be a doctrine without solid foundation, either in reason or policy."

§ 743. The same subject, continued—The receiver's discretion in certain cases.—But in practice it has been found that the receiver must be allowed a certain discretion in matters of detail in

operating railroads, in order that he may discharge his duties to the best advantage.[1] And in a recent case in Louisiana it was held that *ex parte* orders for payment by a liquidator, though unauthorized, may be regarded as confirmatory of his good faith; and when the charges paid were not extravagant, and were for services of experts, attorneys and others, rendered under the eye of the court, some of whom were appointed by the court without opposition, and the conduct of the fiduciary is free from suspicion of fraud, the payment will be viewed as *prima facie* correct.[2] All outlays made by the receiver in good faith, in ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad. His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred not only the keeping of the road, buildings and rolling-stock in repair, but also the providing of such additional accommodations, stock and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance which may involve a considerable outlay of money in lump. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the

court in advance, and obtain its authority for the purchase or improvement proposed.[3] The principle here involved has been applied in a case wher it was held that a receiver of an insolvent railroad corporation has authority, as necessarily incident to the duties imposed upon him, to make such contracts for labor and supplies as are reasonably necessary to enable him to perform the duties of his appointment, and that his contracts for such purposes will bind the trust.[4]

1 *Cowdrey v. The Railroad Company*, 1 Woods, 331, 336.

2 In re Louisiana etc. Deposit Co. 49 La. An. 514.

3 *Cowdrey v. The Railroad Company*, 1 Woods, 331, 336. In this case, which arose upon exceptions to a master's report upon the expenditures of a receiver, the court allowed charges for rebatement of freight, on the ground that it was customary and necessary to secure business; the purchase of a truck wagon and harness for delivering freight in a city, because necessary for the accommodation of customers and to compete with other carriers; the purchase of weighing scales, because procured in good faith and for no possible advantage to the receiver himself, they remaining the assets and property of the road; rent for extra offices, on the ground that they were needed, and for interest paid for money temporarily borrowed, because the loan was necessary in order to carry on the operation of the road. Rebates upon freight were also allowed in Ex parte Benson, 13 S. C. 33, and money necessarily borrowed to operate the road was allowed to be repaid out of the income in Ex parte Carolina National Bank, 13 S. C. 280. But money spent by a receiver unnecessarily, or not directly for the good of the property, as for the defeat of a subsidy in aid of a parallel road, will not be allowed, even though it appear that the construction of the new road would be a serious detriment to the road in his possession: Cowdrey v. Galveston etc. R. R. Co. 93 U. S. 352; Beach on Receivers, § 361.

4 Lehigh Coal Co. v. Central R. R. Co. 41 N. J. Eq. 167, 175 (1886). See, also, the opinion of DIXON, J., in Vanderbilt v. Little, 43 N. J. Eq. 669

§ 744. Of the right to lease other lines.— When the court has exercised its authority by appointing a receiver, and has taken possession of railroad property by its officer, all requisite powers which may prove to be necessary to protect and to preserve it, pending the litigation, for the benefit of those who may be found to be entitled to it, may be exerted by the court, provided they do

not exceed the powers of the corporation itself. So, in a case where it was shown that such power was necessary and for the best interests of creditors, a receiver was authorized to lease other railway lines and to operate them as a part of the road already in his hands.[1]

1 Gibert v. Washington City etc. R. R. Co. 33 Gratt. 586; Beach on Receivers, § 357.

§ 745. Of the receiver's right to sell securities pledged to him as indemnity against loss on account of a debt of the railroad.—Where an insolvent railroad company, being primarily liable for a temporary debt of the receivership, had placed property in his hands as security for its payment, and a third party had delivered to him certain mortgage bonds as additional security for his indemnity and protection on account of the debt, it was held that the relation of principal and surety existed between the insolvent company and the owner of the pledged bonds; and that, as the amount of the indebtedness was very large, and there were in the hands of the receiver undisposed-of securities of the principal debtor of considerable value, it would be inequitable for the receiver to compel a sale of the property of the surety, pledged to him only as additional security for his protection and indemnity.[1]

1 Philadelphia etc. R. R. Co. v. Little, 41 N. J. Eq. 519, 528; Beach on Receivers, § 364.

§ 746. Of the duties of receivers appointed by the courts of the United States under the statute of March 3, 1887.—A late act of Congress, which promises to have an important effect upon the

duties and powers of receivers appointed by the federal courts, is as follows: "That whenever in any cause pending in any court of the United States there shall be a receiver, or manager, in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding $3,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."[1]

1 Act of March 3, 1887 (Removal of Causes), § 2.

§ 747. Of the right to employ counsel—Compensation of counsel.—A receiver has a right to employ counsel to advise him as to the management of the property placed in his hands, and as to his duties in the premises, the fees for such services constituting a proper charge to be paid out of the funds in his hands.[1] In New York it has been stated to be the rule, that although, in cases presenting difficult questions, a receiver, instead of taking up the time of the court with frequent applications for instruction, may and should apply to his own counsel, yet this should be done either with the sanction of the court or at the expense of the receiver. So, in a case where no authority to employ counsel was asked for or given, and no necessity for

such employment appeared from the evidence, the court refused to allow a claim upon the fund for counsel fees.[2] Independent counsel and solicitor for the receiver of an insolvent corporation should be appointed, instead of permitting the counsel and solicitor of the complainant to act for him.[3] But although the employment of an attorney by a receiver be unlawful, by reason of his employment by an adverse party, he should not for that reason be denied a reasonable compensation for services which were valuable to the receiver, when performed with fidelity and ability; but a charge for services rendered in resisting an application for an accounting by the receiver is properly excluded, as well as charges rendered in a manner influenced by the attorney's professional connection with the adverse party.[4]

1 Hubbard v. Camperdown Mills, 23 S. C. 581.

2 Corey v. Long, 12 Abb. Pr. N. S. 427, 443; S. C. 43 How. Pr. 492. See also Lottimer v. Lord, 4 Smith E. D. 191.

3 Emmons v. Davis etc. Pottery Co. (1889) — N. J. —

4 Clapp v. Clapp, 49 Hun, 195.

§ 748. Of the receiver's right to compensation for his services.—As a general rule, in the absence of statutory regulation, the compensation of the receiver is a matter within the discretion of the court appointing him.[1] In a number of the States the rule prevails that the compensation of a receiver is not to be calculated as a fixed commission, but "is such an amount as would be reasonable for the services required of and rendered by a person of ordinary ability, and competent for such duties and services. This rule makes the compensation depend entirely upon the character of the services rendered

by the receiver. In reference to the amount of the compensation in such a case, the court in Iowa, where this rule prevails, has said: "There can be no reasonable grounds to doubt that the receiver in this case, or some other person possessing equal qualifications, could have been employed by private contract to perform the services rendered in this case for half the amount allowed by the referee. This, it seems to us, is the fair and reasonable test by which the amount of compensation to be allowed should be determined."[2] The court, however, will not, upon exceptions to the master's report, reconsider the allowances made by the master for the compensation of the receiver, in a case where the facts are not before it.[3] And in accordance with this view, the compensation allowed for one year will not necessarily govern as to the amount to be allowed for another year, but the compensation of the receiver may vary with the circumstances of the case.[4] Where the court fixes the compensation of the receiver in advance in the form of a salary, it may make an additional allowance if the facts subsequently seem to justify such a course.[5] Although a lawyer who is appointed a receiver may use his professional knowledge in executing the trust, he will not be allowed counsel fees therefor, since his commissions are considered as full compensation for all his services.[6] A receiver may forfeit his right to compensation by a violation of his duty.[7] For to compensate sloth, ignorance, reckless confusion and procrastinating delay, by which the interests of the *cestui que trust* are impaired instead of being promoted, would be to prevent the very object our system has in view in allowing com-

pensation to trustees, by offering a premium to incapacity and dishonesty.[8]

1 Gardiner v. Tyler, 3 Keyes, 505, 508; S. C. 2 Abb. N. Y. App. 247; Magee v. Cowperthwaite, 10 Ala. 966; Stretch v. Gowday, 3 Tenn. Ch. 565; Baldwin v. Eazler, 34 N. Y. Super. Ct. 275.

2 French v. Gifford, 31 Iowa, 148.

3 Jones v. Keene, 115 Mass. 170.

4 Special Bank Commissioners v. Franklin Institution, 11 R. I. 557.

5 Farmers' Loan & Trust Co. v. Central R. R. Co. 8 Fed. Rep. 60.

6 In re Bank of Niagara, 6 Paige, 213; Beach on Receivers, § 261.

7 Clapp v. Clapp, 49 Hun, 195.

8 Clapp v. Clapp, 49 Hun, 195, quoting Stehman's Appeal, 5 Pa. St. 413.

III.

§ 749. Of the right to borrow money and to issue receiver's certificates—For what specific purposes certificates may be issued. (*a*). **In general.** The rule of first and essential consequence upon this point ought to be that the expenditure contemplated is absolutely necessary in order to preserve the property from destruction or serious injury. This was the pretense upon which the issue of receiver's certificates was at first attempted to be justified, and in the earlier cases it will be found to have been always the reason assigned. But, latterly, the courts have shown a tendency to relax, little by little, somewhat of the strictness of this rule, and to authorize the issue of these debentures for a variety of purposes. The Supreme Court of the United States, speaking generally, has held that they may lawfully be authorized "to raise money necessary for the preservation and management of the property."[1] But no lien on the property exists in favor of debts for money borrowed by the receiver without authority from the court, even though the money be used for such purposes as on

application might have received the sanction of the court.[2] "No limit," says Mr. High, "has been fixed as to the purposes for which receiver's certificates may be issued, other than that they shall be germane to the objects of the receivership, and necessary to the proper administration of the trust."[3] The just criterion of the propriety of the issue of receiver's certificates ought to be the necessity of the expenditures for which it is proposed to raise means,[4] and beyond this the courts, at least in theory, do not seem inclined to go.[5] When it is doubtful that the expenditure will add to the selling price of the railway, the court should not authorize the issue of certificates therefor.[6] The receiver may be authorized to borrow money upon his certificates, "not for convenience or ornament, not to lay out money in ways not essential to the preservation of the property, although the court may think the value of it will be thus increased; not for the completion of an unfinished work, or the improvement, beyond what is necessary for the preservation of an existing one—but to keep it up, to conserve it as a railroad property pending litigation."[7] The authority of a court to order the issue of receiver's certificates for the purpose of *preserving* the property, does not justify raising money by this means for the purpose of pacifying riotous employees who threatened to destroy the property unless their wages should be paid, for it is not to be presumed that the ordinary agencies of the law are insufficient to furnish protection from the threatened destruction or injury.[8]

1 *Wallace v. Loomis*, 97 U. S. 146, 162; Beach on Receivers, § 335.

2 Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434.

3 High on Receivers (2nd ed.), § 398 (d).

4 Jones on Railroad Securities, § 533 *et seq.*; *Cowdrey* v. *Galveston etc. R. R. Co.* 1 Woods, 331.

5 Shaw v. Railroad Co. 100 U. S. 605, 612; *Meyer v. Johnston*, 53 Ala. 237, 348

6 *Investment Co. v. Ohio etc. R. R. Co.* 4 R'y & Corp. Law J. 444; S. C. 36 Fed. Rep. 48.

7 "The Doctrine of Receiver's Certificates," by R. F. Stevens Jr. 28 Cent. Law J. 340, citing *Meyer v. Johnston*, 53 Ala. 237, 346; Jerome v. McCarter, 94 U. S. 734; Bank of Montreal v. Chicago etc. R. R. Co. 48 Iowa, 518; Barton v. Barbour, 104 U. S. 126; Union Trust Co. v. Chicago etc. R. R. Co. 7 Fed. Rep. 513: *Turner v. Peoria etc. R. R. Co.* 95 Ill. 134; 35 Am. Rep. 144; Swann v. Clark, 110 U. S. 602.

8 Raht v. Attrill, 106 N. Y. 423, 435; 60 Am. Rep. 456.

§ 750. (*b*). **For operating expenses, equipment and repairs.**—It is the duty of a receiver of a railway company upon which are devolved, by operation of law, the obligations of a common carrier, to keep the road in a condition suitable and adequate to the safe and rapid transportation of passengers and freight. There is upon this ground a stronger reason for allowing a receiver of property of this sort to expend money upon its maintenance and preservation than exists in favor of such an allowance to any ordinary mortgagee. This reason is grounded in that rule of public economy which requires the public highways to be kept in repair. The public is entitled to protection in the continued use of the railway as a king's highway.[1] The receiver may, therefore, properly issue certificates to meet operating expenses, in default of sufficient current income;[2] to procure necessary rolling-stock, machinery, and supplies;[3] to pay off tax liens upon the property,[4] or to replace earnings diverted from operating expenses and ordinary repairs.[5] So, also, where it was necessary to insure the safety of the trains, that a portion of the track which had been hastily built should be relaid in a substantial man-

ner, the receiver's certificates to meet the expense were approved.[6] And, in another case, where the receivers found, upon taking possession of the property, that several locomotives were in use by the company, under a lease from the maker, for which the rent was unpaid, they were authorized to issue certificates to pay the rent.[7] But when the income of the road is sufficient to meet the expenses of keeping it up in stock and equipments, the court should not permit the receiver to use the income in paying interest to bondholders and then to borrow money to meet current expenses.[8]

1 *Meyer v. Johnston*, 53 Ala. 237, 348, where the whole law of receivers' certificates is brought down to 1875. No study of the subject can be complete without a careful reading of this case.

2 *Wallace v. Loomis*, 97 U. S. 146, 162; *Turner v. Peoria etc. R. R. Co.* 95 Ill. 131; 35 Am. Rep. 141; Stanton v. Alabama etc. R. R. Co. 2 Woods, 50.; *Meyer v. Johnston*, 53 Ala. 237, 346; Hoover v. Montclair etc. R. R. Co. 29 N. J. Eq. 4; Swann v. Clark, 110 U. S. 602. But see Metropolitan Trust Co. v. Tonawanda Valley etc. R. R. Co. 103 N. Y. 245; Vermont etc. R. R. Co. v. Vermont Central R. R. Co. 50 Vt. 500, 569.

3 Swann v. Clark, 110 U. S. 602; Vilas v. Page, 106 N. Y. 439, 451, 452. But see *In re* Philadelphia etc. R. R. Co. 14 Phila. 501.

4 Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434; Humphrey v. Allen, 101 Ill. 490. *Cf.* Taylor v. Philadelphia etc. R. R. Co. 7 Fed. Rep. 377.

5 Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434.

6 Stanton v. Alabama etc. R. R. Co. 2 Woods, 506; Credit Co (Limited) v. Arkansas Central R. R. Co. 15 Fed. Rep. 46. *Cf.* Barton v. Barbour, 104 U. S. 126.

7 Coe v New Jersey Midland R. R. Co. 27 N. J. Eq. 37. See also *Turner v. Peoria etc. R. R. Co.* 95 Ill. 134; 35 Am. Rep. 144; Beach on Receivers, § 387.

8 *In re* Philadelphia etc. R. R. Co. 14 Phila. 501, 502; S. C. *sub nom.* Taylor v. Philadelphia etc. R. R. Co. 9 Fed. Rep. 1.

§ 751. (c). For the payment of debts due to employees and for material and supplies, incurred prior to the receivership.—There is to be found some authority for the rule that a receiver may be allowed to issue certificates in payment for labor, materials, supplies and taxes upon the property due

prior to his appointment.[1] But in New York it is held that a court has no power to authorize a receiver to pay, or to issue his certificates of indebtedness in payment for labor and services in operating the road prior to his receivership, and to make the certificates so issued a lien prior to the mortgage.[2] This, in the absence of a statutory regulation of the matter, it is believed, is the correct rule. There is, however, a statute in New York by which a different relation is established between the receiver of an insolvent railroad corporation and its employees, and under which the receiver is obliged to pay the wages of the employees in preference to all other debts or claims, no distinction being made between wages earned before and those earned after the appointment.[3]

1 Humphreys v. Allen, 101 Ill. 490; Taylor v. Philadelphia etc. R. R. Co. 7 Fed. Rep. 377.

2 *Metropolitan Trust Co. v. Tonawanda Valley etc. R. R. Co.* 103 N. Y. 215 (1886), 8. C. 1 R'y & Corp. Law J. 65, reversing 8. C. 40 Hun, 80; *Rahl v. Attrill*, 42 Hun, 414, 418; S. C. 106 N. Y. 423; 60 Am. Rep. 456, citing Burnham v. Bowen, 111 U. S. 776, 782; Beach on Receivers, § 588.

3 N. Y. Laws of 1885, ch. 376.

§ 752. (*d*). **For completing an unfinished road.** There are circumstances under which the court may authorize its receiver to issue certificates for the purpose of completing an unfinished railway; as, for example, to prevent the lapse of a grant of land conditioned upon its completion, which is a material part of the bondholders' security.[1] In Iowa the court of last resort has approved of the issue of certificates by a receiver for the purpose of completing and building certain portions of the road in his hands, at the rate of $8,000 per mile upon the whole road completed and to be completed, making

the outlay a first lien upon the property.[2] But, except under very extraordinary circumstances, the power of the court ought never to be e ercised to enable the trustees, where the road is unfinished, to borrow money by means of a receiver's certificate, which creates a paramount lien upon the property, in order to complete the work.[3] For it is no part of the duty of a court of chancery to build railroads, and the assent of all parties interested in the property cannot make it one.[4] Even in cases where the necessity is so great as to warrant such unusual action, the better course is to obtain, if possible, the consent of prior mortgagees, if any there be.[5] The power has, however, been exercised, without such consent first obtained, upon a showing that the success of the road depended upon its operation and completion.[6] It is plain that an unlimited exercise of power by the court in this direction would amount to improving the mortgagor out of his property.[7] Accordingly the court will construe strictly an authority granted to the receiver to construct a road, and a mere authority to borrow money to build will not authorize the receiv. r to contract for municipal aid in the work.[8] And an issue of certificates for such a purpose in excess of the amount authorized, is beyond the power of the receiver, and the certificates are void.[9]

1 Kennedy v. St. Paul etc. R. R. Co. 2 Dill. 448; S. C. 5 Dill. 519. The form of the order in this case may well be consulted. It is said by Mr. Jones to be "most carefully drawn": Jones on Railroad Securities, § 535, n. See, also, Jerome v. McCarter, 94 U. S. 734. *Acc.* Jerome v. McCarter, 94 U. S. 734, 738 (a canal case).

2 Bank of Montreal v. Chicago etc. R. R. Co. 43 Iowa, 518. *Acc.* Gibert v. Washington etc. R. R. Co. 33 Gratt. 586, 645; Southerland etc. v. Lake Superior etc. Co. (U. S. Dist. Ct. Mich. E. D.), MS., cited in *Meyer v. Johnston*, 53 Ala. 237, 338; Hyde v. Sodus Point etc. R. R. Co. (N. Y. Sup. Ct.), MS.

3 Shaw v. Railroad Co. 100 U. S. 605, 612. In South Carolina it has

been held that the question of the necessity for building or finishing a road should be referred to a master for investigation and determination": Hand v. Railway Co. 10 S. C. 406; S. C. *sub nom.* Hand v. Savannah etc. R. R. Co. 17 S. C. 219.

4 Credit Co. v. Arkansas Central R. R. Co 15 Fed. Rep 46. To the same effect see Vermont etc. R. R. Co. v. Vermont Central R. R. Co. 50 Vt. 530, 569; S. C. 46 Vt. 792. *Cf.* Secor v. Toledo R. R. Co. 7 Biss. 513.

5 *Meyer v. Johnston*, 53 Ala. 237.

6 Miltenberger v. Logansport R. R. Co. 106 U. S. 286; Bank of Montreal v. Chicago, Clinton etc. R. R. Co. 43 Iowa, 518.

7 Sandon v. Hooper, 6 Beav. 256; 2 Jones on Mortgages, § 1126.

8 Smith v. McCullough, 104 U. S. 25, 59.

9 Newbold v. Peoria etc. R. R. Co. 5 Bradw. 367; Beach on Receivers, § 391.

§ 753. The priority of the lien created by the certificates.—Receivers' certificates are, as a rule, expressly declared, by the order of the court under which they are issued, to be a first lien upon the entire property, income and franchises of the road. There has been, therefore, but little litigation thus far upon this point. The theory of the matter is this: The expenditure is necessary to preserve the property; the mortgagee assents to the expenditure; the court orders it to be made; it is, therefore, properly a lien prior to the mortgage, and must be paid first. These facts, or some others equivalent thereto, and the order of the court declaring the lien, are usually recited in the body of the certificate itself. The power of a court of equity to authorize the issue of certificates by the receiver, and to make them a first lien upon the property, payable before the first mortgage bonds, is not questioned in any of the cases in our State or federal reports. It has been expressly upheld in many leading cases.[1] We find, therefore, that the courts do not hesitate to create these liens upon mortgaged property, and that the legality and validity of receivers' certificates, as first liens, are not disputed in the reported cases.[2]

The holders of these securities must see to it, however, that, in the order distributing the purchase-money, a proper provision is incorporated for their redemption; because if once the property is sold and the court makes a final decree without providing for the payment of the certificates, and the receiver is discharged, there is, in some sort, an end of the matter. The receiver cannot be sued; the court has no longer either the suit or the property under its control, and is powerless to compel payment of such obligations, although in one such case it seems to have been held that the purchaser took the property subject to all claims which might be enforced against the receiver.[3] The right of the court to make the receivers' certificates a lien prior to the mortgage bondholders' has been doubted by eminent authority.[4] In a majority of cases where receivers' certificates are made a prior lien upon railroad property, some portion, at least, of the holders of senior liens assent because it is idle to oppose. It cannot be seriously questioned that the exercise of this power by the courts impairs, *quoad hoc*, the obligation of the mortgage contract, and, in practice, it is notorious that it frequently diverts a large portion of the mortgage security. It is little short of monstrous that a court of chancery should assume the exercise of such a power.[5]

1 *Union Trust Co. v. Illinois Midland R. R. Co.* 117 U. S. 437, 453, Credit Co v. Arkansas Central R. R. Co. 15 Fed. Rep. 46; S. C. 23 Am. Law R. & N. S. 35, and see the note thereto by Mr. Adelbert Hamilton; Wallace v. Loomis, 97 U. S. 146, 162; Miltenberger v. Logansport R. R. Co. 106 U. S. 286, 309; Union Trust Co. v. Illinois Midland R. R. Co. 117 U. S. 434, 451, 454; Stanton v. Alabama etc. R. R. Co. 2 Woods, 506; Hoover v. Montclair etc. R. R. Co. 29 N. J. Eq. 4; *Meyer v. Johnston*, 53 Ala. 237, 350; Langdon v. St. Paul etc. R. R. Co. 2 Dill. 448; S. C. 5 Dill. 519; Bank of Montreal v. Chicago etc. R. R. Co. 48 Iowa, 513; Taylor v. Philadelphia etc. 7 Fed. Rep. 377; Jerome v. McCarter, 94 U. S. 734; Cowdrey v. Railroad Co. 1 Woods, 331; Vermont etc. R. R. Co. v. Vermont Central R. R. Co. 49 Vt. 792; S. C. 50 Vt. 500, 569. In speaking of the exercise of the

power to issue these certificates, Mr. Jones, in his learned work upon Railroad Securities, says, "This authority of the courts when properly exercised is highly beneficial to the mortgage bondholders": Jones on Railroad Securities, page 507.

2 Upon the general question of priority in these cases, see Dunham v. Cincinnati etc. R. R. Co. 1 Wall. 254; Huidekoper v. Locomotive Works, 99 U. S. 258; Denniston v. Chicago etc. R. R. Co. 4 Biss. 414; Duncan v. Mobile etc. R. R. Co. 2 Woods, 542; Brown v. Erie R'y Co. 19 How. Prac 84; Vatable v. New York etc. R. R. Co. 95 N. Y. 49; Turner v. In ianapolis etc. R. R. Co. 8 Biss. 315; Atkins v. Petersburg R. R. Co. 3 Hughes, 307; Davis v. Gray, 16 Wall. 203; Douglas v. Cline, 12 Bush, 608; Tomney v. Spartanburg etc. R. R. Co. 4 Hughes, 64; Kelly v. Receiver of Green Bay etc. R. R. Co. 10 Biss. 151; S. C. 5 Fed. Rep. 848; Calhoun v. St. Louis etc. R. R. Co. 9 Biss. 330; Ellis v. Boston etc. R. R. Co. 107 Mass. 28; Coe v. C. P. & I. R. R. Co. 10 Ohio St. 372; 75 Am. Dec. 517; Gurney v. Atlantic etc. R. R. Co. 58 N. Y. 358; Union Trust Co. v. New York etc. R. R. Co. 25 Feb. Rep. 803. Where the order of court, authorizing the issuance of receiver's certificates for the purpose of borrowing money to carry on the business in his hands, does not limit the payment of the certificates to any particular fund, the right of a *bona-fide* holder for value of those certificates to come upon the general assets, to the prejudice of general creditors, is not affected by a *quasi* limitation apparent upon the face of the certificates: Appeal of Neafie (1888), — Pa. St. —

3 Farmers' Loan & Trust Co. v. Central R. R. Co. of Iowa, 7 Fed Rep. 537. But here the court had in the final decree reserved jurisdiction to enforce as liens upon the property all liabilities incurred by the receiver.

4 High on Receivers (2nd ed.), § 398 c. *Cf.* Jones on Railroad Securities, § 539.

5 Beach on Receivers, § 393. The late Judge BAXTER of the United States Circuit Court, for the Sixth Circuit, in the unsavory Pesse Receiver case, and elsewhere, is reported to have expressed himself strongly against the practice of issuing receivers' certificates. See 11 Chicago Legal News; see, also, the chapter on Receivers' Certificates in "An Investor's Notes on American Railways," by John Swann; G. P. Putnam's Sons, New York, 1886. See also, Williams v. Washington City etc. R. R. Co. 33 Gratt. 536, 624; Blythe v. Lewis, 75 Va. 701; Skiddy v. Atlantic etc. R. R. Co. 3 Hughes, 320; Jessup v. Atlantic etc. R. R. Co. 3 Woods, 441; Hale v. Frost, 99 U. S. 389.

§ 754. The order authorizing the issue can be made only upon notice to all the parties in interest. It is fundamental that an order for the issue of the certificates can be lawfully made only after due notice to all the parties in interest, and after a full hearing, all parties being represented, as to the necessity or propriety of the expenditure proposed.[1] And receiver's certificates for money borrowed to operate the road will be presumed to have been taken subject to liens already existing in favor of parties not before the court, and such parties will

be permitted subsequently to come in and impeach the certificates.[2] Thus, if the railroad is sold to satisfy the certificates, the sale will not divest a mechanics' lien claimed by a creditor for the construction of the road, if he had instituted proceedings to enforce his lien before the appointment of a receiver, and was not made a party to the suit in which the receiver was appointed, and in which the property was sold. In such a case, the receiver in no way represents the creditor claiming the lien, and the property is therefore to be regarded as having been sold subject to his lien.[3] If prior incumbrancers do not assent to the lien of the receiver's certificates they must be made expressly subject to the prior mortgages.[4]

1 *Ex parte* Mitchell, 12 S. C. 83; *Meyer v. Johnston*, 53 Ala. 237, 349; Wallace v. Loomis, 97 U. S. 146, 163; Beach on Receivers, § 333. But see, for a modification of this rule, Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434, 456, 463.

2 Hervey v. Illinois Midland R'y Co. 28 Fed. Rep. 169.

3 Snow v. Winslow, 54 Iowa, 200.

4 In re United States Rolling Stock Co. 55 How. Prac. 286.

§ 755. The same subject, continued—Express consent of the parties in interest not essential. It is not essential, however, to the validity of receivers' certificates that the consent of the bondholders should be expressly given to their issue.[1] Their validity may rest upon the doctrine of estoppel. A bondholder desiring to question their validity and priority of lien must do so before they are sold. And if, with knowledge of the facts, he permits them to be sold without objection, neither he, nor those claiming under him with notice of the facts, will afterward be heard to question the payment of the certificates in full out of the proceeds

of the foreclosure sale, prior to a distribution among the bondholders.[2] Particularly will the bondholders be bound by the issue, when they appoint a committee of their own number to represent them in matters pertaining to the management of the property, and the committee consents to the issue of the certificates.[3] And notice to the trustees of the mortgage, is sufficient as notice to the bondholders.[4] Upon the same principle, namely, that of estoppel, the purchaser at the foreclosure sale, having no interest in the trust fund represented by the certificates, cannot contest the validity of their issue, or question the amount for which they were declared to be a lien upon the property. The decree of foreclosure, adjudicating the certificates to be a lien in a specified amount, binds equally the purchaser and all persons claiming under him.[5]

1 Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434.

2 Humphreys v. Allen, 101 Ill. 490. *Cf.* Langdon v. Vermont etc. R. R. Co. 53 Vt. 228.

3 Langdon v. Vermont etc. R. R. Co. *supra*. But see, also, the dissenting opinion of WALKER, J., in Humphreys v. Allen, 101 Ill. 490.

4 *Wallace v. Loomis*, 97 U. S. 146, 163; Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434, 463.

5 Central National Bank v. Hazard (U. S. Cir. Ct. Northern District of New York, March 1837), 1 R'y & Corp. Law J. 347; Swann v. Wright's Executor, 110 U. S. 597; Swann v. Clark, 110 U. S. 602. See, also, Adams v. Barnes, 17 Mass. 387; Campbell v. Hale, 16 N. Y. 585, 589; Horton v. Davis, 26 N. Y. 495; Freeman v. Auld, 44 N. Y. 50; Harkinson v. Sherman, 74 N. Y. 83; *Grissler v. Powers*, 81 N. Y. 67; 37 Am. Rep. 435; Freeman on Judgments, § 162.

§ 756. The order authorizing the issue of certificates, strictly construed.—The validity of the certificate depending wholly upon the order of the court, whose officer the receiver is, it is held that the terms of the order are to be strictly construed. The certificate must be issued precisely as the order provides—and for the express purpose proposed.

The force and extent of the order are not to be extended by implication.[1] Accordingly, where an order appointing a receiver of a railroad company, authorized him to issue certificates "for money borrowed, materials furnished or labor performed," such certificates to be treated as receiver's indebtedness, and to constitute a first lien on the road, it was held that the receiver was not authorized to issue certificates in payment for material until it had been furnished, and that certificates issued for material contracted to be delivered, but which in fact never was delivered, were void, and that, inasmuch as they recited upon their face that they were issued under an order of the court, "whether, under the order, the receiver had the power to issue negotiable securities, or for property agreed to be delivered at a future day, were legal questions which the plaintiff was bound to determine at his peril."[2] Power conferred upon receivers to issue certificates does not authorize the issue of a bond, or other negotiable instrument, which shall be good in the hands of a *bona-fide* holder for value, no matter what vice or infirmity may attend its original creation. The paper issued must be governed by the authority under which it is issued, and not by the form the receivers may choose to give it.[3] Neither can certificates be lawfully issued at a higher rate of interest than that allowed by law.[4]

1 See Tennessee v. Edgefield etc. R. R. Co. 6 Lea, 353. *Cf.* Newbold v. Peoria etc. R. R. Co. 5 Bradw. 367; Beach on Receivers, § 384.

2 Bank of Montreal v. Chicago etc. R. R. Co. 48 Iowa, 518, 524. *Cf.* Bank of Montreal v. Thayer, 7 Fed. Rep. 622.

3 Stanton v. Alabama etc. R. R. Co. 2 Woods, 506, 515.

4 *Meyer v. Johnston*, 53 Ala. 237, 351.

§ 757. An order authorizing an issue of certificates pending an appeal, is subject to review. An order of a circuit court, pending an appeal from a decree of foreclosure and sale, authorizing an issue of receiver's certificates, is such a final decree as is a proper subject of appeal. It cannot be argued that such an order is a matter of discretion, and that therefore no appeal will lie; for whether the court below can exercise any such power at all, after the case has been removed from its jurisdiction by an appeal and *supersedeas*, is itself a proper matter of review, and still more, whether, in the exercise of what the court of first instance asserts to be its discretionary power, it has invaded established rights of the petitioners, contrary to law, in such a manner that they can have no relief except by an appeal to the court above.[1]

1 *The Farmers' Loan and Trust Co. Petitioner* (1889), 129 U. S. 206; 5 R'y & Corp. Law J. 123.

§ 758. The non-negotiability of receiver's certificates.—A receiver's certificate is a debt not of the company, but of the receiver as an officer of the court appointing him. The faith of the court is pledged to its payment, at least to the extent of the property in the receiver's hands.[1] But if the fund, or property, be not sufficient to pay all the certificates in full, the holders of them are entitled to a *pro rata* share of the proceeds.[2] Receiver's certificates are not commercial paper. They generally consist rather of an acknowledgment of indebtedness than of an express promise to pay. The fund upon which they are drawn is usually uncertain, and there is no one personally liable for their

payment. The fund in the receiver's hands is alone bound for their redemption, and their payment can be compelled only by an application to the court by whose authority they were issued.[3] It is, therefore, the ordinary rule that they are not negotiable instruments.[4] And the assignor, or indorser, is not liable as a guarantor or indorser of commercial paper; nor does the assignment of them import a warranty that they are collectable or that they will be paid.[5] It has been held, that where certificates of the receiver of a railroad are hypothecated for less than their face value, the holder thereof is entitled, under the decree, to a lien on the road to the extent only of the moneys actually advanced by him and applied by the receiver to the benefit of the trust estate;[6] that their transfer by assignment, or even by delivery, when made payable to bearer, enables the purchaser, or assignee, to recover upon them only to the extent of the first payee; and that they can be enforced against the property, even in the hands of *bona-fide* holders, only to the extent of the money actually advanced by the first taker to the receiver.[7] The better rule, however, would seem to be that the holders of certificates issued at a reasonable discount, under authority of the court, may recover the full face value thereof with interest.[8]

1 *Meyer v. Johnston*, 53 Ala. 349.

2 *Turner v. Peoria etc. R. R. Co.* 95 Ill. 134; 35 Am. Rep. 144.

3 *Wallace v. Loomis*, 97 U. S. 146, 162; Miltenberger v. Logansport R. R. Co. 106 U. S. 286, 309; Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434, 454; *Turner v. Peoria etc. R. R. Co.* 95 Ill. 134; 35 Am. Rep. 144.

4 *Turner v. Peoria etc. R. R. Co.* 95 Ill. 134; 35 Am. Rep. 144; Bank of Montreal v. Chicago etc. R. R. Co. 43 Iowa, 513; Union Trust Co. v. Chicago etc. R. R. Co. 7 Fed. Rep. 513; McCurdy v. Bowes, 88 Ind. 583; Stanton v. Alabama etc. R. R. Co. 2 Woods, 506; Newbold v. Peoria etc. R. R. Co. 5 Bradw. 367; Central National Bank v. Hazard, 1 R'y & Corp. Law J.

347 (U. S. Cir. Ct. Northern District of N. Y. March, 1887); Wood on Railways, p. 1676.

5 McCurdy v. Bowes, 88 Ind. 583.

6 Swann v. Clark, 110 U. S. 602. *Contra*, Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434, where it is also held that there is no obligation on the part of the purchaser to look to the application of the purchase-money paid by him to a receiver for duly authorized certificates. But see Union Trust Co. v. Chicago etc. R. R. Co. 7 Fed. Rep. 513. In this case, where one purchased certificates from an agent or broker of the receiver at a considerable discount, and the agent did not account to the receiver for the proceeds, it was held that the purchaser could not recover upon the certificates.

7 Stanton v. Alabama etc. R. R. Co. 2 Woods, 506; Beach on Receivers, § 396.

8 Union Trust Co. v. Illinois Midland R'y Co. 117 U. S. 434.

§ 759. The invalidity of certificates issued irregularly or without consideration.—It follows from the fact that these certificates are non-negotiable instruments that, when they are issued without consideration, they are invalid, even in the hands of a *bona-fide* holder for value. Especially where the certificates themselves refer on their face to the order under which they have been issued, the holder is bound to take notice of the limitation of the receiver's power, and to know whether the certificates have been lawfully issued.[1] Accordingly, an overissue is void, even in the hands of *bona-fide* holders for value.[2] On their face they refer to the particular power thus conferred, and to the particular case then pending in the court. This is a sufficient notice to put a prudent dealer on inquiry.[3] But when money is advanced in good faith upon such an overissue of certificates, and is used by the receiver in payment of overdue coupons for interest upon the mortgage indebtedness, the persons advancing the money may be subrogated to the rights of the coupon holders, and may receive the proportion due to such coupons out of the proceeds of the

foreclosure sale upon final distribution.[4] If a receiver execute and place upon the market certificates containing false and fraudulent representations, intended to deceive purchasers, he is personally liable thereon in an action for damages brought by one who purchases the certificates in good faith, relying upon such representations.[5]

1 *Turner v. Peoria etc. R. R. Co.* 95 Ill. 134; 35 Am. Rep. 144; Bank of Montreal v. Chicago etc. R. R. Co. 48 Iowa, 513; Baird v. Underwood, 74 Ill. 176; *Husband v. Epplin*g, 81 Ill. 172; 25 Am. Rep. 273; Newbold v. Peoria etc. R. R. Co. 5 Bradw. 377. *Cf.* West v. Foreman, 21 Ala. 400; Corbett v. State, 21 Ga. 257; Harriman v. Sanborn, 43 Me. 128; Railroad Co. v. Howard, 7 Wall. 392, 415; Mechanics' Bank v. New York etc. R. R. Co. 13 N. Y. 599; Voshell v. Hynson, 26 Md. 83; *Union Trust Co. v. Soutter*, 107 U. S. 591; *Fosdick v. Schall*, 99 U. S. 235; Fosdick v. Car Co. 99 U. S. 256; Bright v. North, 2 Phila. 216; Beach on Receivers, § 398.

2 Newbold v. Peoria etc. R. R. Co. 5 Bradw. 367.

3 The master's report referred to in Stanton v. Alabama etc. R. R. Co. 2 Woods, 506, 512, citing In re Magdalena Steam Navigation Co. John. 690; S. C. 6 Jur. N. S. 975. The late Mr. Philip Phillips, of Washington City, was the master from whose report the preceding extract is made.

4 Newbold v. Peoria etc. R. R. Co. 5 Bradw. 367.

5 Bank of Montreal v. Thayer, 7 Fed. Rep. 622.

IV.

§ 760. Of the receiver's liability—(*a*). In his official capacity.—The liability of a managing receiver is generally the same as that of an owner.[1] The receiver incurs no personal liability, however, for damages caused by the operation of the railway in his hands.[2] Any judgment thereon should be against him in his official character.[3] Receivers who are operating railroads under the direction of the court may be held answerable, in their official capacity, for injuries sustained, in the same manner that the corporation would have been liable.[4] In this respect the orders of appointment in railway cases differ most widely from those granted in other cases. The power and duty to manage and operate

involves the necessity of contracting and paying current expenses, of assuming the responsibilities of common carriers for hire as they relate both to passengers and freight, and of other liabilities which attach themselves to railroads as they are ordinarily managed by the corporations which own them. So it has been repeatedly held that in the operation and management of railroads by receivers in chancery, they sustain to persons dealing with them the character of common carriers; and, though they may at all times invoke the aid of the court of chancery in any matter affecting their duty or liability under the receivership, yet, waiving this, they are amenable in the common-law courts to actions for negligence as carriers.[5] A judgment for damages should not prescribe any particular fund upon which it shall constitute a lien, as all the property of the company is in the hands of the court appointing the receiver, and it is for the latter court to determine matters pertaining to the enforcement of the judgment.[6] The fact that a railroad is in the hands of a receiver does not make it any the less liable under the statute of Missouri for double damages for killing cattle.[7] A receiver operating a railway may plead as a defense to an action for injuries sustained from negligence in the running of trains, the statute that requires such suits against railways to be brought within two years; for the receiver is in a certain sense an agent of the company, the judgment against him being payable out of the property of the company, which is, notwithstanding the receivership, the real party defendant.[8] Where property was destroyed by fire, caused by sparks from defective locomotives,

before the appointment of a receiver of the railroad, but after the railroad company had made default in paying a debt secured by mortgage, the court refused to allow claims against the receiver for damages.[9]

1 *Little v. Dusenberry*, 46 N. J. 614, 641; S. C. 50 Am. Rep. 445; Ex parte Brown, 15 S. C. 518.

2 Hopkins v. Connel, 2 Tenn. Ch. 323, 326.

3 Brown v. Brown, 71 Tex. 355; 4 R'y & Corp. Law J. 435.

4 Winbourn's Case, 30 Fed. Rep. 167 (1886); Pope's Case, 30 Fed. Rep. 169 (1886); Ex parte Brown, 15 S. C. 518; Newell v. Smith, 49 Vt. 255. *Cf.* Hopkins v. Taylor, 87 Ill. 436. Whether an action for an injury to an employee lies against a receiver in whose employment he was injured was questioned in Smith v. Potter, 46 Mich. 258. In Iowa, the right to bring such an action is given by statute, as construed in Sloan v. Central Iowa R'y Co. 62 Iowa, 728; and in Central Trust Co. v. Sloan, 65 Iowa, 655.

5 Newell v. Smith, 49 Vt. 255, 264; Beach on Receivers, § 359.

6 Brown v. Brown, 71 Tex. 355; 4 R'y & Corp. Law J. 435.

7 Central Trust Co. v. Wabash etc. R. R. Co. 26 Fed. Rep. 12.

8 Bartlett v. Keim, 50 N. J. 260; 3 R'y & Corp. Law J. 487.

9 Hiles v. Case, Receiver, etc. 9 Biss. 549.

§ 761. (*b*). **In his private capacity.**—A receiver should follow the line of duty marked out by the decree; for any loss resulting from a departure therefrom, and upon contracts unauthorized thereby, he will be held personally liable.[1] Thus, a receiver of a railway company, who, without any order of court, employs a person to manage a hotel owned by the company, and afterward leases it to the manager, without any notice to a person who is furnishing the hotel with supplies, is individually liable therefor.[2] The fact that the departure from the decree of the court is made under the advice of counsel will relieve him from the imputation of *mala fides*, but not from liability.[3] When, however, he has acted under an order of court he cannot be held liable, even though the order be reversed upon appeal.[4] But it has been

held that if a demand against a receiver arise from his having taken unlawful possession of property which is not included in the trust, and which does not involve his administration of the trust, he may be held personally liable as in trespass, even though he took possession of the property under an order of court.[5] Where a receiver, who, by failure properly to discharge the duties of his office, has become liable to account for the loss resulting from his neglect, has been removed, and the entire estate has passed into the hands of his official successor, he is accountable to his successor, and not to the creditors themselves.[6]

1 Sayles v. Jourdan, 50 Hun, 604; McCay v. Black, 14 Phila. 635.

2 Sayles v. Jourdan, 50 Hun, 604.

3 McCay v. Black, 14 Phila. 635, 637. In this case the receiver carried on a business for a time, instead of winding it up immediately, as was contemplated.

4 Holcombe v. Johnson, 27 Minn. 353; Corey v. Lang, 12 Abb. Pr. N. S. 427, 433.

5 Curran v. Craig, 22 Fed. Rep. 101.

6 Clapp v. Clapp, 49 Hun, 195.

§ 762. The same subject, continued—Breach of trust.—A receiver taking advantage of his fiduciary position to reap secret profits for himself, is guilty of a breach of trust, and will be held accountable therefor. And if, in conjunction with others, he attempt unlawfully to derive a secret personal advantage, a court of equity will not aid him to recover his share of the profits of the transaction by compelling his confederates to account.[1] The power of the court to punish the disobedience of its order by a receiver has been most frequently exercised in cases where he neglected or refused to pay over money as directed. In such cases it has been held

that, instead of granting an order in the first instance to commit him, it is the better practice to issue an alternative order directing him to pay the money within a certain time designated in the order or stand committed;[2] that it is not necessary to serve a writ of execution of a decretal order, but only a copy of the order, for disobeying which he may be committed;[3] that, upon an appeal from an order adjudging contempt, the propriety of the order which was disobeyed will not be reviewed;[4] and that, in proceedings for contempt for not paying money as ordered, the receiver cannot justify his refusal by pleading that the money so ordered to be paid was garnisheed.[5] Even if the appointment have been vacated, he is bound to obey an order to restore the property and money in his hands to the parties named in the order, under penalty of being committed for contempt of court.[6]

1 Farley v. St. Paul etc. R. R. Co. 4 McCrary, 138.
2 Davies v. Cracraft, 14 Ves. 143.
3 Anon. Mos. 40.
4 Clark v. Bininger, 75 N. Y. 344.
5 *People v. Brooks*, 40 Mich. 333; 29 Am. Rep. 534.
6 People v. Jones, 33 Mich. 303; Beach on Receivers, § 291.

§ 763. To what court the receiver is amenable. A receiver is amenable to the court which appointed him for a proper discharge of the trust confided to him,[1] and under ordinary circumstances to that court only.[2] Still, where a complaint is made against an officer of the court of chancery for misconduct, while acting under color of authority merely, the court may either itself take cognizance of the complaint and administer justice be-

tween the parties, or may allow the party aggrieved to bring his suit at law for the alleged injury.[3] And when a State court issued an injunction restraining a railroad company from using a certain street for loading and unloading cars, and receivers were afterward appointed for the company by a federal court, who violated the injunction, they were punished by the State court for their contempt, on the ground that the company was at the time of the appointment in duty bound to obey the injunction, and that the receivers were bound to observe and obey it "precisely as though they had been appointed and were acting under the directory of the company."[4]

1 See *passim*, Adams v. Haskell, 6 Cal. 316, 475; 65 Am. Dec. 491; Davies v. Cracraft, 14 Ves. 143; In re B ll's Estate, Law R. 9 Eq. 172; Anon. Mos. 40; *People v. Brooks*, 46 Mich. 333; 29 Am. Rep. 534; Clark v. Bininger, 75 N. Y. 344; People v. Jones, 33 Mich. 303.

2 Conkling v. Butler, 4 Biss. 22, where the court refused to entertain a bill to compel a receiver to account for the performance of his trust, because he was not the officer of that court and could not be required to answer to it; Young v. Montgomery, 2 Woods, 606, 619, where application for the removal of the receiver was made to, and refused by, a court other than the one which appointed him. As he is the officer of the court, and his possession is but its possession, he is not, according to a decision in Georgia, subject to ordinary process of punishment: Field v. Jones, 11 Ga. 413; Beach on Receivers, § 293.

3 *Parker v. Browning*, 8 Paige, 388; 33 Am. Dec. 717.

4 Safford v. People, 85 Ill. 558, 561.

§ 764. The same subject, continued—Effect of the Removal of Causes and Interstate Commerce Acts.—The Interstate Commerce Act seems to contemplate receivers of railroads as persons in charge of the affairs of such roads, without reference to their official relation to the court appointing them. By section 9, suits upon claims for damages by a common carrier may be brought "in any district or circuit court of the United Sta-

of competent jurisdiction," and such court may compel a receiver "to attend, appear and testify in such case, and may compel the production of books and papers of such corporation or company party to the suit." Section 10 makes a receiver, among others, liable to a fine of $5,000 for any infraction of the provisions of the act. Section 16, which relates to disobedience of the lawful orders of the Interstate Commerce Commission, authorizes "the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen," to issue a writ of injunction or other proper process, to restrain such violation or disobedience, and enjoining obedience; and in case of any disobedience of such process, to issue writs of attachment. or other proper process, against such common carrier, or against any owner, lessee, trustee, receiver or other person so failing to obey, and to make an order directing the carrier, or person so disobeying, to pay a sum of money not exceeding $500 for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction, or other proper process. These clauses, taken in connection with section 3 of the Removal of Causes Act of March 3, 1887, providing that a receiver of a United States court "may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court" which appointed him, go far towards impairing those functions of a receiver which have grown out of the principle that he is an officer of

the court appointing him, subject only to its authority and discipline, by substituting for him a business manager, nominated by the court, but subject to other jurisdictions in many of his most important duties and responsibilities.

CHAPTER XXVIII.

OF REORGANIZATION.

§ 765. Introduction.
§ 766. Of statutes relating to reorganization.
§ 767. The same subject, continued—The New York statutes.
§ 768. The provisions of the plan of reorganization to be strictly followed.
§ 769. Of *laches*.
§ 770. Of the power of a majority of the bondholders to control the minority.
§ 771. Of fraud in reorganization.
§ 772. Wherein consists the change in corporate identity.
§ 773. Of the franchise and public obligations of the new company.
§ 774. The reorganized company not liable for the debts and contracts of the old company.

§ 765. Introduction. — The reorganization of a railway company is a business arrangement by which, a new corporation being formed, the franchises and property and certain of the obligations of the old company are transferred to the new.[1] This may be accomplished by a renewal of charter, where the corporate existence of the old company has expired by limitation of time;[2] or reorganization may be effected by a transfer of the corporate assets to a new company by the stockholders of the old, without the intervention of the courts.[3] But as the necessity for the reorganization of railway companies usually arises out of insolvency, their reorganization is generally effected by proceedings in equity to foreclose the mortgages upon the cor-

porate property and franchises.[4] The simplest method of reorganization by foreclosure is a sale of the railway under a decree of court, and the organization of the purchasers into a new corporation; for by the foreclosure the rights of the stockholders in the old company are entirely cut off.[5] But it is sometimes so far within the power of the stockholders and unsecured creditors to embarrass and delay proceedings for the foreclosure of the mortgage and sale of the property, that it is expedient for the mortgage creditors to arrange for a reorganization, and give up something of their own security for the sake of avoiding litigation and delay.[6] Under these plans of reorganization, the old stockholders are allowed to come into the new corporation upon the payment of a certain sum for each share of stock held by them; and the bondholders are generally allowed to exchange the old bonds for new ones issued by the reorganized company upon different terms with respect to interest and time of payment.[7] Without such previous arrangements, great sacrifice and loss would ensue. They are therefore promoted rather than discouraged by the courts.[8] The purchasers of the property and franchises of a railway company at foreclosure sale need not, however, organize a new company to operate the road. They may transfer it to an existing corporation.[9]

1 *Cf.* Cook on Stock & Stockh. § 654.

2 *Cf.* 2 Morawetz on Corporations.

3 See Reilly v. Oglesby, 25 W. Va. 36; Banks v. Judah, 8 Conn. 145; San Francisco etc. R. R. Co. v. Bee, 48 Cal. 398.

4 *Cf. Canada Southern R'y Co. v. Gebhard*, 109 U. S. 509.

5 Thornton v. Wabash R'y Co. 81 N. Y. 462

6 Jones on Railroad Securities, § 614.

7 Cook on Stock & Stockh. § 654.

8 Robinson v. Philadelphia etc. R. R. Co. 28 Fed. Rep. 340; Ricker v. Alsop, 27 Fed. Rep. 251.

9 People v. Brooklyn etc. R'y Co. 89 N. Y. 75. *Cf.* Acres v. Mayne, 59 Texas, 623, 625; Wellsborough etc. Co. v. Griffin, 57 Pa. St. 417.

§ 766. **Of statutes relating to reorganization.**—In several of the American States reorganization is regulated by statute.[1] And it is held that statutes authorizing the mortgaging of the franchises of corporations are in no sense contracts, on the part of the State, with the purchasers of bonds secured by such a mortgage, that the statutory provisions existing at the time of the execution of the mortgage for the incorporation of the purchasers on foreclosure sale shall remain unchanged.[2] Accordingly, the subsequent passage of a statute requiring corporations organized under the laws of the State to pay to the State treasurer a certain percentage upon their capital stock, applies to a corporation formed by the holders of mortgage bonds issued prior to the enactment, and the secretary of State may not lawfully file its articles of association until the tax has been paid.[3]

1 *E. g.* New York Laws of 1874, ch. 430; Ohio Rev. Stat. (1880), §§ 3393 *et seq.*; Ind. Rev. Stat. (1881), § 3945 *et seq.*

2 People v. Cook, 110 N. Y. 443, 450, upon the authority of Memphis etc. R. R. Co. v. Commissioners, 112 U. S. 609.

3 People v. Cook, 110 N. Y. 443.

§ 767. **The same subject, continued—The New York statutes.**—In New York there are several statutes relating to the reorganization of railway companies.[1] The act of 1874, chapter 430, provides that "in case the railroad and property connected therewith, and the rights, privileges and franchises of any corporation, except a street rail-

road company, created under the general railroad law of this State, or existing under any special or general act or acts of the legislature thereof, shall be sold under or pursuant to the judgment or decree of any court of competent jurisdiction, made or given to execute the provisions or enforce the lien of any deed or deeds of trust or mortgage theretofore executed by any such company, the purchasers of such railroad property or franchises, and such persons as they may associate with themselves, their grantees or assignees, or a majority of them, may become a body politic or corporate, and as such may take, hold and possess the title included in said sale, and shall have all the franchises, rights, powers, privileges and immunities which were possessed before such sale by the corporation whose property shall have been sold as aforesaid, by and upon filing in the office of the secretary of State a certificate duly executed under their hands and seals, and acknowledged before an officer authorized to take the acknowledgment of deeds; in which certificate the said persons shall describe by name and reference to the act or acts of the legislature of this State under which it was organized, the corporation whose property and franchises they shall have acquired as aforesaid, and also the court by authority of which such sale shall have been made, giving the date of the judgment or decree thereof, authorizing or directing the same, together with a brief description of the property sold; and shall also set forth," the name of the corporation, the capital stock, the number of directors, and the plans and agreements of reorganization.[2] "Every stockholder in any company, the franchises and

property whereof shall have been sold as aforesaid, shall have the right to assent to the plan of readjustment and reorganization of interests, pursuant to which such franchises and property shall have been purchased as aforesaid, at any time within six months after the organization of said new company, and by complying with the terms and conditions of such plans become entitled to his *pro rata* benefits therein according to its terms."[3]

1 N. Y. Laws of 1850, ch. 140, § 5, as amended by N. Y. Laws of 1854, ch. 282, and by N. Y. Laws of 1873, ch. 710; N. Y. Laws of 1874, ch. 430; Pratt v. Munson, 84 N. Y. 582.

2 New York Laws of 1874, ch. 430, § 1.

3 N. Y. Laws of 1874, ch. 430, § 3. *Cf.* Vatable v. New York etc. R. R. Co. 96 N. Y. 49.

§ 768. The provisions of the plan of reorganization to be strictly followed.—The provisions of the plan of reorganization agreed upon by the parties to foreclosure proceedings must be strictly complied with. Accordingly, where a mortgage of over a million dollars was executed to carry out a plan for securing and preferring only $955,000, the parties were held to be entitled to be restored to their original rights.[1] And to entitle shareholders of the old company to become shareholders in the new, under a plan of reorganization, they must comply strictly with its provisions relating thereto.[2]

1 Miller v. Rutland etc. R. R. Co. 40 Vt. 399; 94 Am. Dec. 414.

2 Thornton v. Wabash R. R. Co. 81 N. Y. 462; Vanalstyne v. Houston etc. R. R. Co. 56 Tex. 377.

§ 769. Of laches.—To secure the benefit of a reorganization scheme, the shareholders should act promptly.[1] The bondholders, also, entering into the plan of reorganization, should surrender their old

bonds before the purchase of the road, otherwise they cannot insist upon the delivery of the new ones.[2] The courts are disinclined to attack any rights which have been acquired under a completed reorganization.[3]

1 Vatable v. New York etc. R. R. Co. 96 N. Y. 49, 57, reversing S. C. 11 Abb. N Cas. 133.

2 Carpenter v. Catlin, 44 Barb. 75, 95.

3 Matthews v. Murchison, 15 Fed. Rep. 691; Wetmore v. St. Paul etc. R. R. Co. 5 Dill. 531.

§ 770. **Of the power of a majority of the bondholders to control the minority.**—The familiar practice in chancery proceedings, where it is practically impossible to bring by personal notice all individuals of a numerous class into court, is to proceed with a sufficient number in that interest to properly represent it.[1] Accordingly, the consent of a majority of the bondholders will have much weight with the court in upholding a scheme of reorganization. To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of fraud, to defeat the wishes of an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders secured by a railroad mortgage bear to each other.[2] In the case last cited, the court said that a trust of the character in question can be determined by the decree of a court of equity upon proper occasion, certainly at the request of a majority in interest of the *cestuis que trust*, and, at all events, when fortified by the concurring sovereign will of the State, and when the proportionate interests of all the

owners of the property are preserved, and the estate is applied to the use for which it was created, and subject to which it is held at all times and by all persons.[3] But, in a recent well-argued case in New York, it was held that a scheme of reorganization could only be made effective in one of two ways—by the consent of all the bondholders, or by a foreclosure cutting off their lien, and so enabling a new corporation to make its own mortgages in its own way; and that a single bondholder has a clear right to stand upon his contract, the trustees or other bondholders having no power or authority to compel him to make a new and different one. "The authorities for any such right," said the court, "are necessarily either unsound or inapplicable; and an illustration of their lack of pertinency is found in *Canada Southern Railroad Co. v. Gebhard.*[4] In that case the scheme of reorganization, which modified and changed the contract rights of bondholders, was authorized and legalized by a special enactment of the Dominion Parliament, and the federal court said of it that, since no constitutional obligation prevented, in that jurisdiction, a destruction of the contract and a substitution of a new one, such legislation must prevail, and govern the rights of the parties. But the court said, also, 'in the absence of statutory authority, or some provision in the instrument which establishes the trust, nothing can be done by a majority, however large, which will bind a minority without their consent.'"[5] But in a case decided in the United States Supreme Court, where the terms of the first, second, and third mortgages authorized the majority of the bondholders to determine the "terms,

conditions, and limitations" under which a reorganization should be effected, it was decided that each bondholder held his interest subject to the controlling power given the majority.[6]

1 *Gates v. Boston etc. R. R. Co.* 53 Conn. 333, 349.

2 Shaw v. Railroad Co. 100 U. S. 605, 613; *Gates v. Boston etc. R. R. Co.* 53 Conn. 333, 345, 346. *Cf.* Canada Southern R'y Co. v. Gebhard, 109 U. S. 527, sometimes ci ed to this point. But see Hollister v. Stewart, 111 N. Y. 644, 659, 660, *infra*.

3. *Gates v. Boston etc. R. R. Co.* 53 Conn. 333, 349.

4 109 U. S. 527.

5 Hollister v. Stewart, 111 N. Y. 644, 659, 660.

6 Sage v. Central R. R. Co. 99 U. S. 334.

§ 771. **Of fraud in reorganization.**—All secret agreements to the advantage of one of the parties to a plan of reorganization, are an abomination unto the court.[1] The directors of a corporation, occupying a fiduciary relation to the stockholders and bondholders, cannot lawfully purchase the corporate property at foreclosure sale, nor participate in a combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice or at the lowest possible price.[2] Directors, so doing, hold the property purchased as trustees for the benefit of the corporation and stockholders, and, upon repayment of the price paid by them, must make over the property to the corporation.[3] So, also, if the trustees under the mortgage buy the property at foreclosure sale, or have an interest in a company which becomes the purchaser, the stockholders of the railway may, within a reasonable time, redeem the property and have the sale set aside. For a mortgagee is a trustee as well as a creditor, and while a purchase by him at his own sale will not, as in the case of

other trustees, render the transaction void, yet it is well settled that he cannot become a purchaser either directly or indirectly so as to cut off the equity of redemption.[4] There is no such fiduciary relation, however, between stockholders as will create a constructive fraud out of a purchase of the corporate property at foreclosure sale by a majority of them acting in good faith and taking no undue advantage of the minority.[5] To save the railway property from sacrifice at the foreclosure sale, the bondholders and stockholders may unite in purchasing it.[6] And there is no rule of law prohibiting the creditors of the company from combining to purchase the road at the foreclosure sale, provided it be no part of their agreement to shut out competition or to take any unfair advantage.[7] Property fraudulently transferred to a new corporation formed by the members of another company, may be followed by execution creditors.[8] A dissenting stockholder seeking to set aside a foreclosure sale on the ground of fraud and collusion between the bondholders and a majority of the stockholders, should make them parties defendant; otherwise his bill is demurrable.[9]

1 *Cf. Ex parte* White, 2 S. C. 469; Bliss v. Matteson, 45 N. Y. 22.

2 Jackson v. Ludeling, 21 Wall. 616, 625; Munson v. Syracuse etc. R. R. Co. 29 Hun, 76; Harts v. Brown, 77 Ill. 226.

3 Harts v. Brown, 77 Ill. 226; Cook on Stock & Stockh. § 653. See, however, Twin Lick Oil Co. v. Marbury, 91 U. S. 587.

4 *Kitchen v. St. Louis etc. R'y Co.* 69 Mo. 224, 260, 261, citing Allen v. Ranson, 44 Mo. 267; 100 Am. Dec 282; Gaines v. Allen, 58 Mo. 543; Reddick v. Gressman, 49 Mo. 332; Thornton v. Irwin, 43 Mo. 153; Cumberland Coal Co. v. Sherman, 30 Barb. 563; Hawley v. Cramer, 4 Cowp. 717; Campbell v. Walker, 5 Ves. 678.

5 Carter v. Ford etc. Co. 85 Ind. 180.

6 Pennsylvania Transportation Co's Appeal, 101 Pa. St. 576. See Sage v. Central R. R. Co. 99 U. S. 334; Ketchum v. Duncan, 96 U. S. 659.

7 Kitchen v. St. Louis etc. R'y Co. 69 Mo. 225, 256.

8 Booth v. Bunce. 34 N. Y. 139; 88 Am. Dec. 372. See Blair v. St. Louis etc. R. R. Co. 22 Fed. Rep. 36; San Francisco etc. R. R. Co. v. Bee, 48 Cal. 398.
9 Ribon v. Railroad Companies, 16 Wall. 446. See, also, Harpending v. Munson, 91 N. Y. 650.

§ 772. **Wherein consists the change in corporate identity.**—Corporations may be different, although the name, the officers, and the members of each are the same. The similarity of name, or even of objects, can not *per se* establish the identity of corporations created at different times by different charters, and having a distinct, independent being; and one corporation may transact the business and pay the debts of another corporation without thereby merging in the latter its distinct corporate existence.[1] An act of the legislature which provides that in a certain contingency the stockholders of an existing corporation shall reorganize as a new corporation, which changes the amount of capital and provides for the stockholders in the existing corporation by reserving a certain amount of stock for them in the corporation to be formed, creates a new corporation and is not an amendment to the charter of the one already in existence. In such a case it is immaterial that the new corporation is called by the same name as the old one.[2] A mere change of name, however, without a change of membership, will not constitute a good defense to an action brought against a corporation under its former name.[3] If there are any creditors of the dissolved corporation, under these circumstances they may cause the property of the defunct corporation to be applied to their debts by means of a receiver.[4] To ascertain whether a charter creates a new corporation, or merely continues the existence of an old one, we must look

to its terms, and give them a construction consistent with the legislative intent and the intent of the corporators.[5] Where the assets of an insolvent corporation, including its name and franchise, were transferred to a new company, which agreed to pay a composition agreed on by the former with most of its creditors, with the understanding that it was to be reimbursed for any sum above the composition rate which it might have to pay to the non-assenting creditors, and thereupon it conducted its business in the office, under the name and franchise, and with the seal, of the old corporation, it was held not to be a new company, and that it was liable to creditors dissenting from the composition.[6]

1 2 Waterman on Corporations, § 436, citing Bellows v. Hallowell etc. Bank, 2 Mason, 31.

2 Marshall v. Western N. C. R. R. 92 N. C. 322.

3 Welfley v. Shenandoah Iron etc. Co. 83 Va. 768.

4 Marshall v. Western N. C. R. R. 92 N. C. 322, citing Young v. Rollins, 85 N. C. 485; Von Glahn v. De Rosset, 81 N. C. 467; Railroad Co. v. Rollins, 82 N. C. 523; Dobson v. Simonton, 86 N. C. 492.

5 Bellows v. Hallowell etc. Bank, 2 Mason, 44.

6 Island City Savings Bank v. Sachtleben, 67 Texas, 420.

§ 773. Of the franchises and public obligations of the new company.—The purchasers of the property and franchises of a railway company, sold under foreclosure, do not acquire the corporate entity—the franchise of being a corporation.[1] The right to be a corporation cannot be mortgaged or transferred. It is obtainable only by direct grant from the State, and not in any degree by the sale and purchase of the franchises of the old corporation.[2] The franchise of eminent domain, however, generally passes to the purchasers under foreclosure

of a mortgage of the property and franchises of the railway company.[3] The persons or corporations acquiring railroad property under foreclosure proceedings, take it subject to the obligation to devote it to the public use for which it was created.[4]

1 Metz v. Buffalo etc. R. R. Co. 58 N. Y. 61; 17 Am. Rep. 201; Wellsborough etc. Plank Road Co. v. Griffin, 57 Pa. St. 417. *Cf.* Commonwealth v. Central Passenger R'y Co. 52 Pa. St. 506; "Foreclosure of Railway Mortgages," by R. Mason Lisle, Am. Law Rev. Dec. 1883. *Contra:* In Texas, the purchasers can still continue to exist and do business as a corporate body, under the name of the sold-out company: Acres v. Moyne, 59 Texas, 623, 625, citing Texas Rev. Stat. art. 4260.

2 People v. Cook, 110 N. Y. 443, 449.

3 Marshall v. Western North Carolina R. R. Co. 92 N. C. 322.

4 *Gates v. Boston etc. R. R. Co.* 53 Conn. 333, 344.

§ 774. The reorganized company not liable for the debts and contracts of the old company. The effect of a foreclosure sale, unless it be impeached for fraud, is to extinguish all the rights of the stockholders of the old company.[1] Independently of statute or of some plan of reorganization, they have no rights whatever in the new company formed by the purchasers at the sale;[2] and the purchasers acquire a title free from any liability upon the debts and contracts of the old company,[3] except such as constitute a lien upon the property, or in some other way bind the property or franchises.[4] Nor is the new company, formed by the purchasers at the foreclosure sale, liable for the debts of the old company, even though the mortgage deed or a statute of the State may provide that under certain conditions the shareholders of the latter may become shareholders in the former.[5] A contract of the old company not to extend its road through a certain city has been held not to bind a new corporation pur-

chasing the property and franchises of the former, when under its charter the latter company had the right to make such an extension of its road.[6] The new corporation may, however, render itself liable for the debts and contracts of the old by an express agreement to that effect.[7] But a corporation succeeding to the franchises, debts and liabilities of another company does not assume liability with respect to the issue of stock to the subscribers of the latter.[8] Where a person purchases a railway at foreclosure sale, and, in conjunction with others, organizes a company for the purpose of operating it, the new company is not liable for injuries resulting from the operation of the road between the time of the foreclosure sale and the time of its organization. The presumption is, that during that time the property was in the possession of the purchaser at the foreclosure sale, and to him the injured party must look for redress.[9]

1 Thornton v. Wabash R'y Co. 81 N. Y. 462; Carpenter v. Catlin, 44 Barb. 75.

2 Thornton v. Wabash R'y Co. 81 N. Y. 462. See City of Menasha v. Milwaukee etc. R. R. Co. 52 Wis. 420; Neff v. Wolf River Boom Co. 50 Wis. 585; Gilman v. Sheboygan etc. R. R. Co. 37 Wis. 317; Sappington v. Little Rock etc. R. R. Co. 37 Ark. 23; Carpenter v. Catlin, 44 Barb. 75. But see *Gates v. Boston etc. R. R. Co.* 53 Conn. 333.

3 Memphis Water Co. v. Majens, 15 Lea, 37; Cook v. Detroit etc. R'y Co. 43 Mich. 349.

4 City of Menasha v. Milwaukee etc. R. R. Co. 52 Wis. 420.

5 Sullivan v. Portland etc. R. R. Co. 94 U. S. 806; Smith v. Chicago etc. R. R. Co. 18 Wis. 17; Marshall v. Western North Carolina R. R. Co. 92 N. C. 331. See, however, University v. Moody, 62 Ala. 369; Francklyn v. Sprague, 121 U. S. 215.

6 City of Menasha v. Milwaukee etc. R. R. Co. 52 Wis. 420.

7 Rutten v. Union Pacific R. R. Co. 17 Fed. Rep. 480 *Cf.* Child v. New York etc. R. R. Co. 129 Mass. 170.

8 Conant v. National etc. Co. 8 Jones & S. 83.

9 Pittsburgh etc. R. R. Co. v. Fierst, 96 Pa. St. 144.

PART III.

RAILWAY CONSTRUCTION—EMINENT DOMAIN.

CHAPTER XXIX.

INTRODUCTORY.

§ 775. Of the sovereign right of eminent domain Delegation thereof to individuals and corporations.
§ 776. Of the discretion of the legislature.
§ 777. Of foreign corporations.
§ 778. An effort to purchase a condition precedent to condemnation.
§ 779. Acquisition of right of way by purchase.
§ 780. Revocation of license.
§ 781. What constitutes a "public use."
§ 782. Of acts which constitute a "taking."
§ 783. Payment before entry.
§ 784. Of the company's title.
§ 785. The rights acquired are present and permanent.
§ 786. Of the quantity of land which may be condemned.
§ 787. The same subject, continued—Statutory regulations
§ 788. Of the company's power to use the lands condemned.
§ 789. Whether the company's possession is exclusive.
§ 790. The location of its route is in the discretion of the company.
§ 791. Change of location.
§ 792. Abandonment and non-user of right of way.

§ 775. Of the sovereign right of eminent domain—Delegation thereof to individuals and corporations.—The right of the State to take private property for public use, or to authorize its taking, without the consent of the owner, upon just compensation being made therefor, exists in her sovereign right of eminent domain.[1] This power is not derived from the federal constitution, but is inherent in the State, and a natural and necessary incident of sovereignty. The constitu-

tion is merely a limitation upon the right, and except for such limitation, compensation would be discretionary with the legislature.[2] The State may exercise the power of eminent domain directly and in her own name, or may place works of public utility in the charge of private corporations or persons, and authorize them to institute and carry to their consummation proceedings seeking the condemnation of property for the use of such works.[3] A corporation to which the power of eminent domain has been delegated, is considered to be an agent of the State.[4] This delegation of authority may be either by special grant, or by general laws authorizing the taking of private property for the public use.[5] And the legislature may confer upon a railway company a general right to condemn lands necessary for the construction of its road, or it may specifically designate what lands shall be condemned, and what estate therein shall be taken.[6] But special grants, with respect to the acquisition of a right of way, are subject to control by subsequently enacted general statutes.[7]

1 *Lance's Appeal*, 57 Pa. St. 16; 93 Am. Dec. 722; Varick v. Smith, 5 Paige, 137; 28 Am. Dec. 417; Harris v. Thompson, 9 Barb. 350; Cooper v. Williams, 7 Me. 273; Spring v. Russell, 3 Watts (Pa.), 294; Henry v. Underwood, 1 Dana, 2 7; O'Hara v. Lexington etc. R. R. Co. 1 Dana, 232; Perry v. Wilson, 7 Mass. 395; De Varaigne v. Fox, 2 Blatchf. 95; Peckham v. Decatur County, 9 Ga 341; Donnaher v. State, 10 Miss. 649; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 339; Cosler v. Tidewater Co. 15 N. J. 54; Bailey v. Miltenberger, 31 Pa. St. 37; Harding v. Goodlett, 3 Yerg. (Tenn.) 41; 24 Am. Dec. 536; Stark v. McGowen, 1 Nott & M C. (S. C.) 387; Lindsay v. Commissioners, 2 Bay (S. C.), 38; Ford v. Chicago etc. R. R. Co. 14 Wis. 609; 80 Am. Dec. 781.

2 Central Branch etc. R. R. Co. v. Atchison etc. R. R. Co. 28 Kan. 453; Wood's Railway Law, 638. "This constitutional provision is not of American origin. It existed in the Roman empire, and in the English constitution, and in most, if not all, the modern European States. In the Code Napoleon, book ii, title ii, 545, it is thus expressed: 'No one can be compelled to give up his property, except for the public good, and for a just and previous indemnity.' This subject is discussed much at length by the civil-law writers referred to in Chancellor Kent's elaborate note

upon the subject, 2 Kent's Commentaries, (7th ed.) 339*: *Hatch v. Vermont Central R. R. Co.* 25 Vt. 49.

3 *Bloodgood v. Mohawk etc. R. R. Co.* 13 Wend. 9; 31 Am. Dec. 313 (annotated); Clarke v. City of Rochester, 24 Barb. 481; In re Kerr, 42 Barb. 121; Bloomfield etc. Co. v. Richardson, 63 Barb. 427; In re Townsend, 39 N. Y. 171; San Francisco etc. R. R. Co. v. Crandall, 31 Cal. 372. A *de facto* corporation may exercise the right of eminent domain delegated to it by the State as well as though legally incorporated, for its legal existence cannot be questioned save by the State, in direct proceedings instituted for that purpose: Reisner v. Strong, 24 Kan. 410; 10 Am. & Eng. R. R. Cas. 335.

4 Alexandria etc. R. R. Co. v. Alexandria etc. R. R. Co. 75 Va. 780; 40 Am. Rep. 743.

5 Central Branch Union Pacific R'y Co. v. Atchison etc. R. R. Co. 26 Kan. 669; Wisconsin Central R. R. Co. v. Cornell University, 52 Wis. 537. A company created under a special charter may condemn lands under a general law: Central Branch Union Pacific R'y Co. v. Atchison etc. R. R. Co. 26 Kan. 6 9.

6 In re Gilbert Elevated R. R. Co. 70 N. Y. 361; In re New York Elevated R. R. Co. 70 N. Y. 327; In re New York Central R. R. Co. 66 N. Y. 407; Rexford v. Knight, 11 N. Y. 308; Heywood v. New York, 7 N. Y. 314; Stockton etc. R. R. Co. v. Brown, 9 H. L. Cas. 246; Iron R. R. Co. v. Ironton, 19 Ohio St. 299; Chicago etc. R. R. Co. v. Lake, 71 Ill 333; Cleveland etc. R. R. Co. v. Speer, 53 Pa. St. 325; 94 Am. Dec. 84; Parke's Appeal, 64 Pa. St. 137, Commonwealth v. Franklin Canal Co. 21 Pa. St. 117; New York etc. R. R. Co. v. Young, 33 Pa. St. 175.

7 Wisconsin Central R. R. Co. v. Cornell University, 52 Wis. 537.

§ 776. Of the discretion of the legislature.—The power of eminent domain is to be exercised by the legislative branch of the government.[1] It is the sole judge of the agencies it will employ in carrying its will into effect.[2] And when the legislature has delegated the right of eminent domain to a company for a public use, the courts cannot review the expediency of its action.[3] But while the legislature is the sole judge of the *expediency* of a grant of the power of eminent domain, where the use is certainly a public one,[4] yet a legislative grant is not conclusive that the objects sanctioned by it do constitute a "public use."[5] And whether any particular use is public in its nature, is always subject to consideration by the courts.[6]

1 Central Branch Union Pacific R'y Co. v. Atchison etc. R. R. Co. 23 Kan 453.

2 Water Works Co. v. Burkhardt, 41 Ind. 364; Holt v. Somerville, 127

Mass. 408; Brayton v. Fall River, 124 Mass. 95; Haverhill Bridge v. County Comm'rs, 103 Mass. 120; 4 Am. Rep. 513; Eastern R. R. Co. v. Boston etc. R. R. Co. 111 Mass. 125; 15 Am. Rep. 13; In re Mt. Washington Road, 35 N. H. 134; Johnson v. Joliet etc. R. R. Co. 23 Ill. 202; Bankhead v. Brown, 25 Iowa, 540; People v. Smith, 21 N. Y. 595; Brooklyn Park Comm'rs v. Armstrong, 45 N. Y. 244; 6 Am. Rep. 70; Bloomfield etc. Co. v. Richardson, 63 Barb. 437.

3 Baltimore etc. R. R. Co. v. Pittsburg etc. R. R. Co. 17 W. Va. 812.

4 Varaigne v. Fox, 2 Blatchf. 95; People v. Smith, 21 N. Y. 595; Lehmicke v. St. Paul etc. R. R. Co 19 Minn. 464; Weir v. St. Paul etc. R. R. Co. 18 Minn. 155; Wilkin v. St. Paul etc. R. R. Co. 16 Minn. 271; Kramer v. Cleveland etc. R. R. Co. 5 Ohio St. 145; Charleston etc. R. R. Co. v. Blake, 6 Rich. (S. C.) 634; Raleigh etc. R. R. Co. v. Davis, 2 Dev. & B. (N. C.) 451; Malone v. Toledo, 34 Ohio St. 451; Hingham etc. Co. v. Norfolk Co. 6 Allen, 353; Philadelphia etc. R. R. Co. v. Williams, 54 Pa. St. 103; Toledo etc. R. R. Co. v. Daniels, 16 Ohio St. 390.

5 In re Deansville Cemetery Association, 66 N. Y. 572; 23 Am. Rep. 86; *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 9; 31 Am. Dec. 313, and note. *Vide infra*, §781.

6 Boom Co. v. Patterson, 98 U. S. 40; Buffalo etc. R. R. Co. v. Brainard, 9 N. Y. 100; People v. Smith, 21 N. Y. 595; Brooklyn Park Comm'rs v. Armstrong, 45 N. Y. 234; 6 Am. Rep. 70; In re Deansville Cemetery Association, 66 N. Y. 569; 23 Am. Rep. 86; Whitman v. Wilmington etc. R. R. Co. 2 Harr. (Del.) 514; Central R. R. Co. v. Pennsylvania R. R. Co. 31 N. J. Eq. 475; S. C. 33 N. J. Eq. 755; Coster v. Tide Water Co. 18 N. J. Eq. 54; Ford v. Chicago etc. R. R. Co. 14 Wis. 609; 80 Am. Dec. 791; New Central Coal Co. v. George's Creek Coal etc. Co. 37 Md. 537; Tyler v. Beacher, 44 Vt. 648; 8 Am. Rep. 398.

§ 777. **Of foreign corporations.**—To enable a foreign corporation to take lands for the construction of its railway, a special legislative grant is requisite. It cannot condemn lands under a general railroad act of the State.[1] And a power to take land which has been granted by the legislature to a domestic corporation, will not pass to a foreign corporation which succeeds to its rights and powers, without the assent of the legislature.[2] This assent, however, need not be expressly given. It may be gathered by implication from a series of legislative acts.[3]

1 Holbert v. St. Louis etc. R. R. Co. 45 Iowa, 23.
2 Abbott v. New York etc. R. R. Co. 145 Mass. 450.
3 Abbott v. New York etc. R. R. Co. 145 Mass. 450.

§ 778. **An effort to purchase, a condition precedent to condemnation.**—It is frequently pro-

vided in the charters of railway companies, or by the general laws of the State, that the company shall, as a condition precedent to condemnation proceedings, make an effort to acquire the property by agreement with the owner.[1] When this is the case, the condition must be fully and in good faith performed, and unless it be shown that the owner is absent or legally incapacitated from making the agreement, the condemnation proceedings cannot be instituted.[2] Whatever the form of the words employed, a statutory direction that there shall be an effort to purchase the property, or an effort to procure an agreement, will be deemed mandatory; and appropriation proceedings will fail unless the statutory requirement is obeyed by making the proper effort before prosecuting proceedings to condemn.[3] Where a railway company has authority to acquire property by eminent domain only in case it cannot be acquired by agreement, the fact of its having entered into an agreement with another company for a right of way across the line of the latter, does not debar it from acquiring a more extended way by eminent domain, if public necessity so demands.[4]

1 *E. g.* In re Prospect Park etc. R. R. Co. 67 N. Y. 371; Brown v. Rome etc. R. R. Co. 86 Ala. 206; Ells v. Pacific R. R. Co. 51 Mo. 240; Lake Shore etc. R. R. Co. v. Cincinnati etc. R. R. Co. 116 Ind. 578; Chicago etc. R. R. Co. v. Illinois Central R. R. Co. 113 Ill. 156.

2 Reitenbaugh v. Chester Valley R. R. Co. 21 Pa. St. 100. Under Sess. Acts Ala. 1884–5, p. 223, relating to condemnation of land by defendant company, providing that if the owners of the lands cannot agree with the company as to damages, "or, in case such owner is an infant, . . . such value or damages shall be ascertained in the manner directed by the general laws," a previous attempt to agree on damages need not be alleged nor proved in the case of lands owned by an infant, though he has a guardian: Brown v. Rome etc. R. R. Co. 86 Ala. 206.

3 Lake Shore etc. R. R. Co. v. Cincinnati etc. R. R. Co. 116 Ind. 578, where, under the Indiana statute, Rev. Stat. 1881, § 3903, subd. 6, it was held that an instrument of appropriation by one railroad company to acquire the right to cross another railroad must allege in positive terms a

failure to agree, not only as to the amount of compensation, but as to the points and manner of crossing.

4 Chicago etc. R. R. Co. v. Illinois Central R. R. Co. 113 Ill. 156.

§ 779. Acquisition of right of way by purchase.—The company may by agreement with the land-owner acquire not only an easement, but also the fee simple in the lands required for the construction of its road.[1] And having acquired the fee, it may convey it to another railway company to be used for the same purposes.[2] The same rules prevail with respect to contracts for the conveyance of lands to railways as govern in similar contracts between private persons;[3] and the contract must be complete,[4] certain,[5] mutual,[6] fair and just,[7] and the remedy must not be harsh or oppressive.[8] So, too, the contract must be free from doubt,[9] misrepresentation or fraud,[10] mistake,[11] or illegality.[12] When a railway company has undertaken to make certain erections for the benefit of the land-owner, a court of equity may decree a specific performance, notwithstanding the existence of a remedy at law in damages for the breach of the contract.[13] And in many cases where specific performance cannot be enforced, a court of equity will restrain a breach of the contract.[14]

1 Yates v. Van Bogert, 53 N. Y. 526; Nicoll v. New York etc. R. R. Co. 12 N. Y. 121; Heath v. Barmore, 50 N. Y. 302; Hill v. Western Vt. R. R. Co. 25 Vt. 63; Holt v. Somerville, 127 Mass. 408; *Page v. Heinberg*, 40 Vt. 81; 99 Am. Dec. 378; State v. Brown, 27 N. J. 13; Wheeling etc. R. R. Co. v. Gourley, 99 Pa. St. 171; McClure v. Missouri etc. R. R. Co. 9 Kan. 373.

2 Nicoll v. New York etc. R. R. Co. 12 N. Y. 121; New Jersey Midland R. R. Co. v. Van Syckle, 33 N. J. 496; Harrison v. Lexington etc. R. R. Co. 9 Mon. B. 470; Pollard v. Maddox, 28 Ala. 321; Junction R. R. Co. v. Ruggles, 7 Ohio St. 1; Wood's Railway Law, 601.

3 Wood's Railway Law, 606.

4 Losee v. Morey, 57 Barb. 561; Johnson v. Johnson, 16 Minn. 517; Barnet v. Dougherty, 32 Pa. St. 372; Walker v. Eastern Counties R'y Co. 6 Hare, 57; Purrington v. Illinois etc. R. R. Co. 48 Ill. 297.

5 Stuart v. London etc. R'y Co. 1 De Gex, M. & G. 721; South Wales

R'y Co. v. Wythes, 5 De Gex, M. & G. 88; Wilson v. Northampton R'y Co. Law R. 9 Ch. 279; Hood v. North Eastern R'y Co. Law R. 5 Ch. 525; Holmes v. Eastern Counties R'y Co. 3 Kay & J. 675.

6 Rogers v. Saunders, 16 Me. 92; 33 Am. Dec. 635.

7 Marble Co. v. Ripley, 10 Wall. 339; Webb v. Direct London etc. R'y Co. 9 Haro, 129.

8 Clark v. Rochester etc. R. R. Co. 18 Barb. 350; Edwards v Grand Junction R'y Co. 1 Mylne & C. 674; Hawkes v. Eastern Counties R'y Co. 1 De Gex, M. & G. 737; Wood's Railway Law, 606, 607.

9 Pyrke v. Waddingham, 10 Hare, 1; Walsh v. Hall, 66 N. C 233; Kortenhader v. Spotts, 50 Pa. St. 430; Owings v. Baldwin, 8 Gill. (Md.) 337; Allen v. Atkinson, 21 Mich. 351; Taylor v. Williams, 45 Mo. 80; Jeffries v. Jeffries, 117 Mass. 184; Dobbs v. Norcross, 24 N. J. Eq. 327.

10 Holmes's Appeal, 77 Pa. St. 50; Gunby v. Slater, 64 Md. 237; Law v. Grant, 37 Wis. 54 ; Hickey v. Drake, 47 Mo. 353.

11 Bradbury v. White, 4 Me. 391; Peterson v. Grover, 20 Me. 363; Wycombe R'y Co. v. Donnington Hospital, Law R. 1 Ch. 268.

12 Flanagan v. Great Western R'y Co. Law R. 7 Eq. 116; Wood's Railway Law, 607.

13 Hawkes v. Eastern Counties R'y Co. 5 H. L. Cas. 331; Stuart v. London etc. R'y Co. 15 Beav. 513; Tillett v. Charing Cross Bridge, 26 Beav. 419; Boston etc. R. R. Co. v. Babcock, 3 Cush. 228; Lexington etc. R. R. Co. v Ormsby, 7 Dana, 276; Blanchard v. Detroit etc. R. R. Co. 31 Mich. 43; 18 Am. Rep. 142; Wood's Railway Law, 607.

14 Coe v. Louisville etc. R. R. Co. 3 Fed. Rep. 775; Western Union Tel. Co. v. Union Pacific R. R. Co. 3 Fed. Rep. 721; Port Clinton R.R. Co. v. Cleveland etc. R. R. Co. 13 Ohio St. 544; Blanchard v. Detroit etc. R. R. Co. 31 Mich. 43; 18 Am. Rep. 142; Blackett v. Bates, Law R. 2 Ch. 117; Shrewsbury etc. R. R. Co. v. Stour Valley R. R. Co. 2 De Gex, M. & G. 866; Wood's Railway Law, 607.

§ 780. **Revocation of license.**—A parol license to a railway company to enter upon land and construct its road, is revocable at the pleasure of the licensor,[1] especially when it was granted in ignorance, or under a misapprehension of the effect of its exercise;[2] for the law presumes that when a man assents to the doing of an act, he only assents to its being so done as not to injure him.[3] But until the license be revoked, it is a bar against an action for trespass for acts committed within the scope of the license prior to its revocation.[4] And after a licensee has expended money in making erections of a permanent character, so that a revocation would operate as a fraud upon

him, a court of equity will enforce the license as an agreement to give the right.[5]

1 Murdock v. Prospect Park R. R. Co. 73 N. Y. 579; *Huff v. McCauley*, 53 Pa. St. 206; 91 Am. Dec. 203; Houston v. Laffee, 46 N. H. 505; Hetfield v. Central R. R. Co. 29 N. J. 571. *Cf.* Miller v. Auburn etc. R. R. Co. 6 Hill (N. Y.), 61.

2 Brown v. Bowen, 30 N. Y. 519; 86 Am. Dec. 406; Dempsey v. Kipp, 61 Barb. 311; Smith v. Scott, 1 Kerr (N. B.), 1; Allen v. Fiske, 42 Vt. 462; Eaton v. Winne, 20 Mich. 156; 4 Am. Rep. 377; Hamilton v. Winndolf, 36 Md. 301; 11 Am. Rep. 491; Eustis v. Chiner, 56 Me. 407; Freeman v. Hadley, 33 N. J. 523; Giles v. Simonds, 15 Gray, 401; Moye v. Tappan, 22 Cal. 306; Drake v. Wells, 11 Allen, 141; Miller v. State, 39 Ind. 267; Druse v. Wheeler, 22 Mich. 439; Dodge v. McClintock, 47 N. H. 383; Wood's Railway Law, 610.

3 Blankhardt v. Houghton, 27 Beav. 425. *Cf.* McKnight v. Ratcliff, 44 Pa. St. 159; Wood on Railways, 611.

4 Baltimore etc. R. R. Co. v. Algire, 63 Md. 319; Louisville etc. R. R. Co. v. Thompson, 18 Mon. B. 785; Foot v. New Haven etc. R. R. Co. 23 Conn. 214; Wolfe v. Frost, 4 Sand. Ch. 72; Mumford v Whitney, 15 Wend. 379; 30 Am. Dec. 60; Railroad Co. v. McLaughlin, 59 Pa. St. 23; Cook v. Prigdon, 45 Ga. 331; 12 Am. Rep. 582; Houston v. Laffee, 46 N. H. 538; Bridges v. Purcell, 1 Dev. & B. 462; Tompkins v. Augusta etc. R. R. Co. 21 S. C. 420.

5 Brown v. Bowen, 30 N. Y. 543; 86 Am. Dec. 406; Veghte v. The Raritan etc. Co. 19 N. J. Eq. 142; Taylor v. Chicago etc. R. R. Co. 63 Wis. 327; Wood on Nuisances, 347.

§ 781. **What constitutes a "public use."**—The legislature can authorize the taking of private property for public uses only, and then only upon just compensation being made therefor.[1] Railroads, although owned by individuals, or by private corporations, are generally of public necessity and importance, and therefore the power of eminent domain may be exercised in their behalf.[2] But lands cannot be condemned for the construction of a railway intended for a private use, such as the carriage of freight between a manufactory and the main line of a railway.[3] And the conveyance of sight-seers along the Niagara river has been held, in New York, not to be such a public use as would warrant the condemnation of lands under the statute of that State.[4] But a railway company

whose object is to afford facilities for a mining district, is none the less entitled to condemn land, from the mere fact that it may be used by only a small portion of the public.[5]

1 *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 9; 31 Am. Dec. 313 (annotated); *Embury v. Conner*, 3 N. Y. 517; 53 Am. Dec. 325, and note; Forney v. Fremont, 23 Neb. 465; 33 Am. & Eng. R. R. Cas. 162; People v. White, 11 Barb. 31; Taylor v. Porter, 4 Hill, 147; 40 Am. Dec. 274; People v. Supervisors, 4 Hill, 73; *Sharpless v. Mayor etc. of Philadelphia*, 59 Am. Dec. 729. As to what constitutes a public use, see note to *Reddall v. Bryan*, 74 Am. Dec. 550. See, also, as to the rule for determining what uses are public, Baltimore etc. R. R. Co. v. Pittsburg etc. R. R. Co. 17 W. Va. 813.

2 Olcott v. Supervisors, 16 Wall. 695; Stockton etc. R. R. Co. v. City of Stockton, 41 Cal. 179; Clarke v. City of Rochester, 5 Abb. Pr. 124; S. C. 14 How. Pr. 211; Bellinger v. New York Central R. R. Co. 23 N. Y. 48; Drake v. Hudson River R. R. Co. 7 Barb. 552; *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 9; 31 Am. Dec. 313 (annotated); Parmelee v. Oswego etc. R. R. Co. 7 Barb. 625; Gould v. Hudson River etc. R. R. Co. 12 Barb. 628; People v. Law, 34 Barb. 502; People v. Kerr, 27 N. Y. 91.

3 Chicago etc. R. R. Co. v. Wiltse, 116 Ill. 449. But see Chicago Dock and Canal Co. v. Garrity, 115 Ill. 155. *Cf.* Chicago etc. R. R. Co. v. Wiltse, 116 Ill. 449

4 In re Niagara Falls etc. R. R. Co. 107 N. Y. 642.

5 State v. Hibernia Underground R. R. Co. 47 N. J. 43.

§ 782. Of acts which constitute a "taking." The word "taking," as applied to the appropriation of private property to a public use, is broadly construed, and includes not only an actual entry and taking of possession, but also any act whereby its value is diminished;[1] such as depositing stone, sand and other rubbish upon it;[2] obstructing access to the land;[3] building an arch over it or tunneling under it,[4] exposing the property to injury by fire,[5] or to danger from properly executed blasting;[6] injuring growing crops;[7] interfering with a natural stream of water, resulting in a diminution of its value, or in injury to adjacent lands.[8] Although the damage may be only nominal, yet if the act is a violation of any private right, and is of such a nature that, if continued for a long period of time, the

wrong-doer may acquire title by prescription, the person whose rights are violated may maintain his action therefor without proof of any actual damage.[9] But entry for the purpose of surveying and locating a railway is not a taking;[10] though even in case of entry for survey, if the agents of the company commit any wanton or unnecessary acts, it will be held liable in trespass therefor.[11]

1 Setzler v. Pennsylvania etc. R. R. Co. 112 Pa. St. 56; East St. Louis v. O'Flynn, 119 Ill. App. 200, 64; 59 Am. Rep. 795; Glover v. Powell, 10 N. J. Eq. 211; Wilmes v. Minneapolis R'y Co. 29 Minn. 242. The words "or damaged," in Neb. Const. art. i, § 21, include all damages arising from the exercise of the right of eminent domain, which cause a diminution in the value of private property: *Omaha v. Kramer*, 25 Neb. 489; Blakely v. Chicago etc. R. R. Co. 25 Neb. 207.

2 East Pennsylvania R. R. Co. v. Schollenberger, 54 Pa. St. 144.

3 Union etc. R. R. Co. v. Young (Ind. 1882), 5 Am. & Eng. R. R. Cas. 346; Caledonian R'y Co. v. Walker's Trustees, Law R. 7 App. Cas. 259; 6 Am. & Eng. R'y Cas. 518; Dreher v. Iowa etc. R'y Co. 59 Iowa, 399. *Cf.* Midland R. R. Co. v. Miles, 30 Ch. Div. 634, where the owner was obliged to tunnel under the railway to gain access to minerals.

4 Ramsden v. Manchester R'y Co. 12 Jur. 293; Pinchin v. London etc. R'y Co. 5 DeGex, M. & G. 851; Sparrow v. Oxford etc R'y Co. 2 DeGex, M. & G. 94.

5 Setzler v. Pennsylvania etc. R. R. Co. 112 Pa. St. 56.

6 St. Peters v. Denison, 58 N. Y. 416; 17 Am. Rep. 258; Brown v. Providence R. R. Co. 5 Gray, 35; Whitehouse v. Androscoggin R. R. Co. 53 Me. 208; Carmen v. Steubenville etc. R. R. Co. 4 Ohio St. 399.

7 Lances v. Chicago etc. R. R. Co. 57 Iowa, 636; Gilmore v. Pittsburgh etc. R. R. Co. 104 Pa. St. 275.

8 Pumpelly v. Green Bay Co. 13 Wall. 166; Parke v. Kilham, 8 Cal. 77; 68 Am. Dec. 310; Oliver v. Fenner, 3 R. I. 215; Gillett v. Johnson, 30 Conn. 183; Davis v. Fuller, 12 Vt. 178; 36 Am. Dec. 334; Parker v. Griswold, 17 Conn. 288; 42 Am. Dec. 739; Thompson v. Crocker, 9 Pick. 59; Trenton Water Power Co. v. Raff, 36 N. J. 335; Wabash etc. Canal v. Spears, 16 Ind. 441; 79 Am. Dec. 444; Evansville etc. R. R. Co. v. Dick, 9 Ind. 433; Hooker v. New Haven etc. Canal Co. 14 Conn. 145; 35 Am. Dec. 477; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Ashley v. Port Huron, 33 Mich. 296; 24 Am. Rep. 552; Lee v. Pembroke Iron Co. 57 Me. 481; 2 Am. Rep. 59; Arimond v. Green Bay etc. Canal Co. 31 Wis. 316; Glover v. Powell, 10 N. J. Eq. 211; Lehigh Valley R. R. Co. v. McFarlan, 31 N. J. Eq. 706; Cahill v. Eastman, 18 Minn. 324; 10 Am. Rep. 184; Kemper v. Louisville, 14 Bush, 87.

9 Mills on Eminent Domain, § 30; New Orleans Tel. Co. v. Southern Tel. Co. 53 Ala. 211; Lund v. New Bedford, 121 Mass. 286.

10 Republican Valley R. R. Co. v. Fink, 18 Neb. 82; Oregonian R'y Co. v. Hill, 2 Or. 377; Bonaparte v. Camden etc. R. R. Co. 1 Bald. 205; Polly v. Saratoga etc. R. R. Co. 9 Barb. 449; *Bloodgood v. Mohawk etc. R. R. Co.* 14 Wend. 51; 31 Am. Dec. 313 (annotated;) Cushman v. Smith, 34 Me. 247; Fox v. Western Pacific R. R. Co. 31 Cal. 538; Lyon v. Green Bay etc. R. R. Co. 42 Wis. 538.

11 New Orleans R. R. Co. v. Jones, 68 Ala. 48; Bonaparte v. Camden R. R. Co. 1 Bald. 205.

§ 783. **Payment before entry.** — Statutes authorizing individuals or corporations to enter upon private lands for the purpose of subjecting them to a public use, without providing that payment or tender of compensation, or security therefor, shall be first made, are now generally held to be unconstitutional.[1] For neither an award of damages nor a judgment secures to a land-owner the just compensation due him for his property.[2] A deposit in court, however, is deemed sufficient security.[3] There are some early cases, in which, while the question was not necessarily involved, it is intimated that an act not providing any direct method of compelling compensation, may be constitutional, on the ground that the legislature may be trusted to supply an adequate remedy in due time, on its attention being called to the defect in the law.[4] And there are cases holding that payment need not be made in advance if there be an adequate remedy by which it may be compelled.[5] But these cases cannot now be considered as the law. If there be any case in which the property may be taken before payment, it is one in which an adequate fund is paid into court or placed in the hands of an agent or depositary who is not a member of nor under the control of the person or corporation seeking to condemn the property;[6] otherwise the statute will be unconstitutional.[7] In Kentucky, it is held that the constitution does not authorize a company to take possession of lands upon execution of a bond; and that an act of legislature giving such authority is unconstitutional.[8]

A statute making no provision for compensation cannot be supported on the ground that the legislature deemed the benefits to accrue from the work equivalent to the value of the land taken.[9] The temporary occupation of property for the purpose of making preliminary surveys, may be authorized by the legislature, without requiring that compensation be first assessed and paid.[10]

1 People v. Loew, 102 N. Y. 471; S. C. 39 Hun, 490; Redman v. Philadelphia etc. R. R. Co. 33 N. J. Eq. 165; Carson v. Coleman, 3 Stockt. 106; Moody v. Jacksonville etc. R. R. Co. 20 Fla. 597; Beasley v. Mountain Lake Co. 13 Cal. 318; Bohlman v. Green Bay etc. Co. 30 Wis. 105; Wheeler v. Essex Public Road, 39 N. J. 291; Pearson v. Johnson, 54 Miss. 259; Thompson v. Grand Gulf R. R. & B. Co. 3 How. (Miss.) 240; 34 Am. Dec. 81; City of Chicago v. Barbian, 80 Ill. 482.

2 Moody v. Jacksonville etc. R. R. Co. 20 Fla. 597.

3 The General Railroad Act of New York, N. Y. Laws of 1850, ch. 140, § 18, authorizes the company to enter and take possession upon making a deposit sufficient to cover the award, and costs, and counsel fees. In Florida, it is held that such a deposit is sufficient security of compensation to warrant entry pending condemnation proceedings: State v. Baker, 20 Fla. 616 In Indiana, such a deposit pending an appeal, gives the company a license to take possession, but does not vest in it the title: Terre Haute etc. R. R. Co. v. Crawford, 100 Ind. 550. So, also, in Missouri the title to land, for which proceedings for condemnation have been instituted by a railroad company, remains in the owner, until payment of the damages assessed; and where on exceptions taken by the owner a new hearing is granted, his title will not be divested by payment of damages into court: Green v. Missouri Pacific R'y Co. 82 Mo. 653. See further, with respect to deposits, State v. Lubke, 14 Mo. App. 152; In re New York etc. R. R. Co. 98 N. Y. 12.

4 *Jerome v. Ross*, 7 Johns. Ch. 315; 11 Am. Dec. 484. *Cf.* Northern Pacific R. R. Co. v. Barnesville etc. R. R. Co. 1 Am. & Eng. R. R. Cas. 8.

5 Rexford v. Knight, 61 N. Y. 313; People v. Canal Comm'rs, 5 Denio, 404; Goldsmid v. Lewis County Bank, 7 Barb. 427; Wallace v. Karlenowefski, 19 Barb. 121; *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 9; 31 Am. Dec. 313 (annotated); Gould v. Glass, 19 Barb. 179, 190; Chapman v. Gates, 46 Barb. 318; S. C. 54 N. Y. 144.

6 Sanborn v. Belden, 51 Cal. 266, and cases cited *supra*.

7 People v. Mayor of Brooklyn, 9 Barb. 556; Hartwell v. Armstrong, 19 Barb. 171; Russell v. Mayor of New York, 2 Denio, 472; Lyon v. Jerome, 26 Wend. 493; 37 Am. Dec. 271; McCauley v. Weller, 12 Cal. 529; People v. Hayden, 6 Hill, 361; Bensley v. Mountain Lake Co. 13 Cal. 318; 73 Am Dec. 575.

8 *Covington etc. R. R. Co. v. Piel*, 87 Ky. 267. *Cf.* Sanborn v. Belden, 51 Cal. 266; California Southern R. R. Co. v. Southern Pacific R. R. Co. 65 Cal. 293; Cal. Code Civ. Proc. § 1251.

9 Carson v. Coleman, 3 Stockt. 106.

10 Chambers v. Cincinnati etc. R. R. Co. 69 Ga. 320; Steuart v. Mayor and City Council of Baltimore, 7 Md. 516; Merritt v. Northern R. R. Co. 12 Barb. 606; Polly v. Saratoga etc. R. R. Co. 9 Barb. 458; Walther v.

Warner, 25 Mo. 229; Orr v. Quimby, 54 N. H. 596; Cushman v. Smith, 34 Me. 256; Lebanon v. Olcott, 1 N. H. 345. See, also, *Bloodgood v. Mohawk etc. R. R. Co.* 31 Am. Dec. 374, and note; S. C. 18 Wend. 9.

§ 784. **Of the company's title.**—While the State may undoubtedly appropriate, or authorize the appropriation of, the fee simple estate in lands, for the use of highways, railways, and other public purposes,[1] yet the laws for the exercise of the right of eminent domain do not, as a general rule, assume to go further than to appropriate an easement, leaving the title in fee in the original owner. This is especially true of ordinary highways, in which the public have a perpetual easement, the soil remaining the property of the adjacent owner, for every purpose of use or profit consistent therewith.[2] So, generally, railroads acquire but an easement, and the fee remains in the original owner of the soil, subject to that use,[3] which, upon abandonment, reverts to the owner of the soil,[4] and another company cannot make use of the right of way without compensating him.[5] It is otherwise, of course, if the fee is acquired.[6] But the question as to whether the company has acquired a fee, or only an easement, is purely one of construction for the courts, to be determined in view of the language used in the act conferring the authority to take the lands, and of the purposes for which they were taken.[7] It was held that merely an easement was passed by a conveyance to a railway company of the right of way, undefined in width, over certain land, with a stipulation that the company should "have and hold the said rights and privileges to the use of said

company, so long as the same shall be required for the uses and purposes of said roads."[8]

1 *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722, and note; Water Works Co. v. Buckhart, 41 Ind. 364; Challis v. Atchison etc. R. R. Co. 16 Kan. 117; Dingley v. City of Boston, 100 Mass. 544; Coster v. New Jersey R. R. Co. 23 N. J. 227; Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234; 6 Am. Rep. 70; Raleigh etc. R. R. Co. v. Davis, 2 Dev. & B. 451; State v. Rives, 5 Ired. 297; Malone v. City of Toledo, 34 Ohio St. 541; Halderman v. Pennsylvania Central R. R. 50 Pa. St. 425; De Varaigne v. Fox, 2 Blatchf. 9 .; Cooley's Constitutional Limitations, *558. *Cf.* Giesy v. Cincinnati etc. R. R. Co. 4 Ohio St. 308.

2 Peck v. Smith, 1 Conn. 104; 6 Am. Dec. 216; Deaton v. County of Polk, 9 Iowa. 594; Perley v. Chandler, 6 Mass. 454; 4 Am. Dec. 159; Adams v. Emerson, 6 Pick. 57; *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722, and note 729; Stackpole v. Healey, 16 Mass. 33; 8 Am. Dec. 121; Robbins v. Borman, 1 Pick. 122; Makepeace v. Worden, 1 N. H. 16; Avery v. Maxwell, 4 N. H. 36, 37; Mills v. Stark, 4 N. H. 512, 513; 17 Am. Dec. 444; Copp v. Neal, 7 N. H. 275, 2 6; State v. New Boston, 11 N. H. 407; Baker v. Shepard, 24 N. H. 208; Jackson *ex dem.* Yates v. Hathaway, 15 Johns. 447; Babcock v. Lamb, 6 Cow. 238, 240; Barclay v. Howell's Lessee, 6 Pet. 498.

3 Alabama etc. R. R. v. Burkett, 42 Ala. 83; Peoria etc. R. R. v. Burkett, 62 Ill. 332; Henry v. Dubuque etc. R. R. Co. 2 Iowa, 288; *Kansas Central R'y v. Allen*, 22 Kan. 285; 31 Am. Rep. 190; Weston v. Foster, 7 Met. 297; *Proprietors of Locks v. Nashua etc. R. R. Co*, 104 Mass. 1; 6 Am. Rep. 151; Scott v. St. Paul etc. R'y Co. 21 Minn. 322; Cotton v. Boom Co. 22 Minn. 372; Blake v. Rich, 34 N. H. 282; Heard v. City of Brooklyn, 60 N. Y. 242; Lyon v. Gormley, 53 Pa. St. 261; Western Pennsylvania R. R. Co. v. Johnston, 53 Pa. St. 290, 294; Pittsburgh etc. R. R. v. Bruce, 102 Pa. St. 23; 10 Am. & Eng. R'y Cas. 1; Hasson v. Oil Creek R. R. Co. 8 Phila. 553; Quimby v. Vermont Central R. R. Co. 23 Vt. 387. See, also, note to *Lance's Appeal*, 93 Am. Dec. 722, 729; S. C. 55 Pa. St. 16. *Cf. Chicago etc. R. R. Co. v. Patchin*, 16 Ill. 198; 61 Am. Dec. 65; *Munger v. Tonawanda R. R. Co.* 4 N. Y. 349; 53 Am. Dec. 384. Even an underground railroad company, condemning land, acquires an easement only, and not a fee simple: *Hibernia Underground R. R. Co. v. De Camp*, 47 N. J. 518; 54 Am. Rep. 197.

4 Pittsburgh etc. R. R. Co. v. Bruce, 102 Pa. St. 23; Hastings v. Burlington etc. R. R. Co. 38 Iowa, 316; Hooker v. Utica etc. Turnpike Co. 12 Wend. 371; Jessup v. Loucks, 55 Pa. St. 361.

5 Pittsburgh etc. R. R. Co. v. Bruce, 102 Pa. St. 23.

6 Haldeman v. Pennsylvania Central R. R. Co. 50 Pa. St. 425; Rexford v. Knight, 11 N. Y. 308.

7 Washington Cemetery v. Coney Island etc. R. R. Co. 68 N. Y. 591; Quimby v. Vermont Central R. R. Co. 23 N. Y. 387; Heard v. Brooklyn, 60 N. Y. 242; State v. Rives, 5 Ired. 297.

8 Douglass v. Thomas, 103 Ind. 187.

§ 785. The rights acquired are present and permanent.—Whatever rights are acquired under condemnation proceedings are present and permanent, not future and temporary.[1] Thus, it is held

that an underground railroad company cannot compel an owner of land in fee simple to yield a right to build a road on the happening of a future contingent event;[2] and that such a railway company cannot condemn the mere privilege of maintaining a railroad only until the owner shall choose to make an inconsistent use of the site of the road-bed.[3]

1 *Hibernia Underground R. R. Co. v. De Camp*, 47 N. J. 518; 54 Am. Rep. 197.

2 *Hibernia Underground R. R. Co. v. De Camp*, 47 N. J. 518; 54 Am. Rep. 197.

3 *Hibernia Underground R. R. Co. v. De Camp*, 47 N. J. 518; S. C. 54 Am. Rep. 197.

§ 786. Of the quantity of land which may be condemned.—A railway company can only condemn so much land as is necessary for the construction and convenient use of its road,[1] the taking of earth for fillings, and the construction of necessary appurtenances;[2] but the necessity need not be made certain before condemnation.[3] Neither is it necessary to condemn at one time all the land which it may need; but from time to time the company may acquire additional lands as the necessity for them arises,[4] the right of condemnation not being exhausted by the completion of its road.[5] When the right of way has been fenced by the land-owner, a presumption arises that it is limited to the land thereby inclosed; and unless this presumption be rebutted, the railroad cannot encroach beyond the fence without making compensation.[6] But proof that soon after the road was built the president reported to the stockholders that a right of way for double tracks had been secured, will rebut the presumption that the right of way is lim-

ited to the strip of land fenced by the land-owner.[7] When the charter of a railway company confers the right to take all such lands as may be indispensable to the completion of its road, there seems to be no question but that the company may take materials, such as gravel, stones, *et cetera*, from adjoining lands *in invitum;* and the damages therefor need not be assessed until after the materials are taken.[8] A company has the same authority to condemn land over which to swing a gate, which it is compellable to maintain, as that necessary for the construction of its track.[9] When a railroad company is authorized by its charter to appropriate for terminal purposes lots contiguous to its road, lots separated therefrom by intersecting streets are regarded as contiguous.[10] But the statute of New Jersey, authorizing railway companies to condemn lands "adjoining their road as constructed," does not apply to lands adjoining a side-track to a freight-house.[11] A company having express power to build a lateral road, may condemn land for that purpose.[12] When, however, it is authorized to condemn land for a side-track, it cannot appropriate it for the construction of a branch road to subserve a private use; but if, in addition to serving such use, the track be one which is necessary for the convenient operation of the main line, then it may come within the meaning of a side-track.[13]

1 Chicago etc. R. R. Co. v. Dunbar, 100 Ill. 110; Forney v. Fremont etc. R. R. Co. 23 Neb. 465; 33 Am. & Eng. R. R. Cas. 162.

2 Lawrence v. Morgan's etc. R. R. Co. 39 La. An. 427.

3 Chicago etc. R. R. Co. v. Dunbar, 100 Ill. 110.

4 Fisher v. Chicago etc. R. R. Co. 104 Ill. 323; Peck v. Louisville etc. R'y Co. 101 Ind. 366.

5 Central Branch etc. R. R. Co. v. Atchison etc. R. R. Co. 26 Kan. 669. As to the right to acquire land for a branch road after the original road is

completed, see Fisher v. Chicago etc. R. R. Co. 104 Ill. 323; S. C. 10 Am. & Eng. R. R. Cas. 14.

6 Westchester etc. R. R. Co. v. Goddard (1888), — Pa. —; 33 Am. & Eng. R. R. Cas. 195.

7 Westchester etc. R. R. Co. v. Goddard (1888), — Pa. —; 33 Am. & Eng. R. R. Cas. 195.

8 Wood's Railway Law, 742, 743; *Bloodgood v. Mohawk etc. R. R. Co.* 14 Wend. (N. Y.) 51; 31 Am. Dec. 313 (annotated); Bradshaw v. Rogers, 20 Johns. (N. Y.) 744; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 343; 11 Am. Dec. 481; *Jerome v. Ross*, 4 Wend. (N. Y.) 650; 11 Am. Dec. 434; Wheelock v. Pratt, 4 Wend. 647; Lyon v. Jerome, 15 Wend. 569; Vermont etc R. R. Co. v. Baxter, 22 Vt 365; Lesher v. Wabash Nav. Co. 14 Ill. 85; 56 Am. Dec. 494; Bliss v. Hosmer, 15 Ohio, 44.

9 In re New York etc. R. R. Co. 33 Hun, 148.

10 Baltimore etc. R. R. Co. v. Edmonds, 3 Mackey, 526.

11 State v. United New Jersey R. R. etc. Co. 43 N. J. 110.

12 Lower v. Chicago etc. R. R. Co. 59 Iowa, 563.

13 South Chicago R. R. Co. v. Dix, 109 Ill. 237.

§ 787. The same subject continued—Statutory regulations.—The width of a railroad company's right of way is frequently prescribed in its charter, or by the general law of the State.[1] Under a statute restricting the width of every "railroad" built thereunder to one hundred feet, the term "railroad" extends to all the necessary appurtenances, and not merely to the bed and tracks of the road.[2] Where the width of a railway is regulated by statute, such width is a jurisdictional fact, of which advantage may be taken at any stage of the action to condemn.[3] Under a statute authorizing a railway company to lay out its roadway not exceeding six rods wide, it will be presumed that a grant of a right of way extended to the full statutory width, as against one claiming under the grantee.[4]

1 Campbell v. Indianapolis R. R. Co. 110 Ind. 490. In Alabama, the statute prescribes a width of 100 feet; and a company petitioning for more must specify the purpose for which it is desired, and describe the portion of the line at which the addition is sought: Brown v. Rome etc. R. R. Co. 83 Ala. 226. So, in New Jersey, the width is 100 feet: Revision of N. J. 225. Under Pa. Act of May 5, 1832, Pa. L. 501, and Pa. Act of April 18, 1865, Pa. L. 64, lateral railways, whether single or double track, cannot be

constructed of greater width than twenty feet: Pittsburg Bank v Shoenberger, 111 Pa. St. 95.

2 State v. Hudson Terminal R'y Co. 46 N. J. 289.

3 Pittsburg Bank v. Shoenberger, 111 Pa. St. 95.

4 Campbell v. Indianapolis R. R. Co. 110 Ind. 490.

§ 788. Of the company's power to use the lands condemned.—It is the privilege of a railway company to lay its track on whatever part of its right of way it may deem expedient.[1] A grant of a right of way carries with it the right to construct suitable culverts, and to cut ditches to lead the water into them, although for that purpose it may be necessary to extend the ditches beyond the right of way.[2] The railroad is entitled, for the purpose of constructing, repairing and using its road, to remove earth, gravel, stone, timber and other materials from the land appropriated.[3] But under a quitclaim of "a right of way" to a railway company "for all purposes connected with the construction, use and occupation of said railway," the company was held to possess no authority to remove from the right of way, sand for the construction of a round-house.[4] Under a grant of land for "railroad and depot purposes," the company may permit its patrons to construct elevators, corn-cribs, etc., which facilitate its business.[5] And where land was taken under the Massachusetts statute,[6] for depot and station purposes, and actually used for such purposes, it was held not to entitle owners of the land to a recovery of the same in a writ of entry, for the company to permit the station-master, in return for his services and the payment of a specific sum, to maintain a piggery, a boarding-house, and a stable thereon, and to cultivate a part thereof.[7] But a company

has no authority to use a right of way, taken under the power of eminent domain, for any other independent purpose than that for which it was acquired.[8] For the exercise of the right of eminent domain is in derogation of private right, and the authority must be strictly construed. What is not expressly granted is not conferred.[9] Private property, therefore, taken for public use, must be held in accordance with and for the purposes which justified its taking.[10]

1 Dougherty v. Wabash etc. R'y Co. 19 Mo. App. 419.

2 Read v. New York Central R. R. Co. 18 Barb. (N. Y.) 80; Babcock v. Western R. R. Co. 9 Met. 553; 43 Am. Dec. 411; Boothby v. Androscoggin R. R. Co. 51 Me. 318; Hortsman v. Lexington etc. R. R. Co. 18 Mon. B. 218; Conwell v. Springfield etc. R. R. Co. 81 Ill. 232.

3 Henry v. Dubuque etc. R. R. Co. 2 Iowa, 288; Preston v. Dubuque etc. R. R. Co. 11 Iowa, 15; *Chapin v. Sullivan R. R. Co.* 39 N. H. 564; 75 Am. Dec. 237; *Aldrich v. Drury*, 8 R. I. 554; 5 Am. Dec. 624; Brainard v. Clapp, 10 Cush. 6; 57 Am. Dec. 74. As to the uses to which a railroad company may put its right of way when obtained by condemnation, and also when obtained by purchase of fee, see further, Cassidy v. Old Colony R. R. Co. 141 Mass. 174.

4 *Vermilya v. Chicago etc. R'y Co.* 36 Iowa, 605; 55 Am. Rep. 279.

5 Illinois Central R. R. Co. v. Wathen, 17 Ill. App. 582.

6 Mass. Stat. 1874, ch. 372, § 60.

7 Pierce v. Boston etc. R. R. Co. 141 Mass. 491.

8 *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722.

9 *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722.

10 *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722.

§ 789. Whether the company's possession is exclusive.—After the location and acquisition of the right of way, the company may maintain its action in tort against persons illegally entering thereon.[1] There are cases in which it has been held that the right of the railroad to possession is practically exclusive, giving the adjacent land-owner no right to enter and take herbage and other products of the soil;[2] but the better rule would seem to be, that he retains every right in the land condemned not in-

consistent with the purpose for which it is taken by the railway.[3] The company has no right, as against him, to give away grass cut by his servants upon the land.[4] Such rights of private use, however, as interfere with the operation of the railway, are included under the condemnation and in the compensation awarded. Thus, unless expressly reserved to him, the owner retains no right of private crossing.[5] Where the report of commissioners condemning land for railroad use included the value of buildings erected thereon, the buildings passed with the land, and the owner having appealed, and then dismissed the appeal, and accepted the amount of award, is estopped from claiming possession of the buildings, and from removing them.[6]

1 Greenville etc. R. R. Co. v. Parttow, 14 Rich. S. C.) 237; Connecticut etc. R. R. Co. v. Hatton, 32 Vt. 43; Morrison v. Bucksport etc. R. R. Co. 67 Me. 353; Bangor etc. R. R. Co. v. Smith, 47 Me. 34; *Troy etc. R. R. Co. v. Potter*, 42 Vt. 265; 1 Am. Rep. 325.

2 Jackson v. Rutland etc. R. R. Co. 25 Vt. 151; 60 Am. Dec. 246; Connecticut etc. R. R. Co. v. Holton, 32 Vt. 43; *Troy etc. R. R. Co. v. Potter*, 42 Vt. 265; 1 Am. Rep. 325.

3 Bailey v. Sweeney, 64 N. H. 296; Lyon v. Gormley, 53 Pa. St. 261; Leavenworth etc. R. R. Co. v. Paul, 23 Kan. 816, 10 Am. & Eng. R. R. Cas. 490, where it was held that the owner retained a right to the grass upon the lands condemned: Preston v. Dubuque etc. R. R. Co. 11 Iowa, 15; Blake v. Rich, 34 N. H. 282; Hasson v. Oil Creek R. R. Co. 8 Phila. 556.

4 Bailey v. Sweeney, 64 N. H. 296.

5 Cedar Rapids etc. R. R. Co. v. Raymond, 37 Minn. 204.

6 Chicago etc. R. R. Co. v. Knuffke, 36 Kan. 367.

§ 790. The location of its route is in the discretion of the company.—A railway company is liable in an action for damages for an unauthorized location of its road; and a statute ratifying an illegal location of the road as actually laid out and constructed, does not exempt the company from liability for injuries caused by the manner in which it was constructed or is maintained at the

time of the enactment.[1] But when the *termini* of a railway are fixed by the charter, neither a court of equity nor of law will attempt to control the exercise of its discretion in the location of its route between the designated points.[2] And the question whether the company could not at a reasonable expense and without undue detriment to the road have located it so as to avoid the injury to the plaintiff's property, cannot be properly submitted to the jury.[3]

1 *Salem v. Eastern R. R. Co.* 98 Mass. 431; 96 Am. Rep. 650; Commonwealth v. Old Colony etc. R. R. Co. 14 Gray, 93.

2 Wood's Railway Law, 743, 744; Hentz v. Long Island R. R. Co. 13 Barb 646; People v. New York Central R. R. Co. 74 N. Y. 302; Walker v. Mad River etc. R. R. Co. 8 Ohio, 33; Fall River Iron Works v. Old Colony R. R. Co. 5 Allen, 221; Parke's Appeal, 64 Pa. St. 137; Southern Minn. R. R. Co. v Stoddard, 6 Minn. 150; Cleveland etc. R. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84; Struthers v. Dunkirk R. R. Co. 87 Pa. St. 282.

3 New York etc. R. R. Co. v. Young, 33 Pa. St. 175; Southern Minnesota R. R. Co. v. Stoddard, 6 Minn. 150; Cleveland etc. R. R. Co. v. Stockhouse, 10 Ohio St. 567.

§ 791. **Change of location.**—When a company has once located its route, and taken the steps necessary to acquire the right of way, it cannot, without the consent of the legislature, change its location, unless the power to do so is expressly conferred by its charter, or by the general statute under which it was incorporated.[1]

1 Works v. Junction R. R. Co. 5 McLean, 425; Hudson etc. Canal Co. v. New York etc. R. R. Co. 9 Paige Ch. 323; Buffalo etc. R. R. Co. v. Pottle, 23 Barb. 21; People v. New York etc. R. R. Co. 45 Barb. 73; Mason v. Brooklyn etc. R. R. Co. 35 Barb. 37; Mississippi etc. R. R. Co. v. Devaney, 42 Miss. 555; 2 Am. Rep. 608; South Carolina R. R. Co. v. Blake, 9 Rich. 228; Knight v. Carrollton R. R. Co. 9 La. An. 284; Ex parte South Carolina R. R. Co. 2 La. An. 434; Boston etc. R. R. Co. v. Midland R. R. Co. 1 Gray, 340; San Francisco etc. R. R. Co. v. Mahoney, 29 Cal. 112; Hazen v. Boston etc. R. R. Co. 2 Gray, 574; Old Colony R. R. Co. v. Miller, 125 Mass. 1; 28 Am. Rep. 194; Charlestown etc. R. R. Co. v. Commissioners, 7 Met. 78; Ham v. Salem, 100 Mass. 380; Davidson v. Boston etc. R. R. Co. 7 Allen, 326; Boynton v. Peterborough etc. R. R. Co. 4 Cush. 467; *Lance's Appeal*, 55 Pa. St. 16; 93 Am. Dec. 722; Brigham v. Agricultural etc. R. R. Co. 1 Allen, 316; Mississippi etc. R. R. Co. v. Devaney, 42 Miss. 555; 2 Am. Rep. 608; State v. Norwalk etc. Co. 10 Conn. 157; Moorhead v. Little Miami R. R. Co. 17 Ohio St. 340; Hastings v. Amherst etc. R. R. Co. 9 Cush. 596;

Little Miami R. R. Co. v. Naylor, 2 Ohio St. 235; Doughty v. Somerville etc. R. R. Co. 21 N. J. 442; 3 Halst. Ch. 629; 51 Am. Dec. 267; Morris etc. R. R. Co. v. Central R. R. Co. 31 N. J. 205.

§ 792. **Abandonment and non-user of right of way.**—A company may be divested of its right of way by suffering another company to construct its road upon it.[1] But mere non-user will not deprive it of its title.[2] Nor does a land-owner lose his right to compensation for a right of way conveyed by him to the company, on account of its failure to construct its road within the time agreed upon in the deed.[3] The right of the owner to compensation for property taken by a railway company, is not affected by his having obtained a judgment against another company previously condemning it; and, in such a case, the former judgment is conclusive as to the *quantum* of damages.[4] But, if the judgment against the first company has been paid, the land-owner is not entitled to receive compensation from another company condemning the route of the former, unless, of course, the original compensation has been refunded.[5]

1 Chesapeake etc. Canal Co. v. Baltimore etc. R. R. Co. 4 Gill & J. 1; Coe v. New Jersey Midland R. R. Co. 34 N. J. Eq. 105.

2 Hestonville etc. R. R. Co. v. Philadelphia, 89 Pa. St. 210; Barlow v. Chicago etc. R. R. Co. 29 Iowa, 276; Noll v. Dubuque etc. R. R. Co. 32 Iowa, 66.

3 Thornton v. Sheffield etc. R. R. Co. 74 Ala. 109.

4 Bridgeman v. St. Johnsbury etc. R. R. Co. 58 Vt. 198.

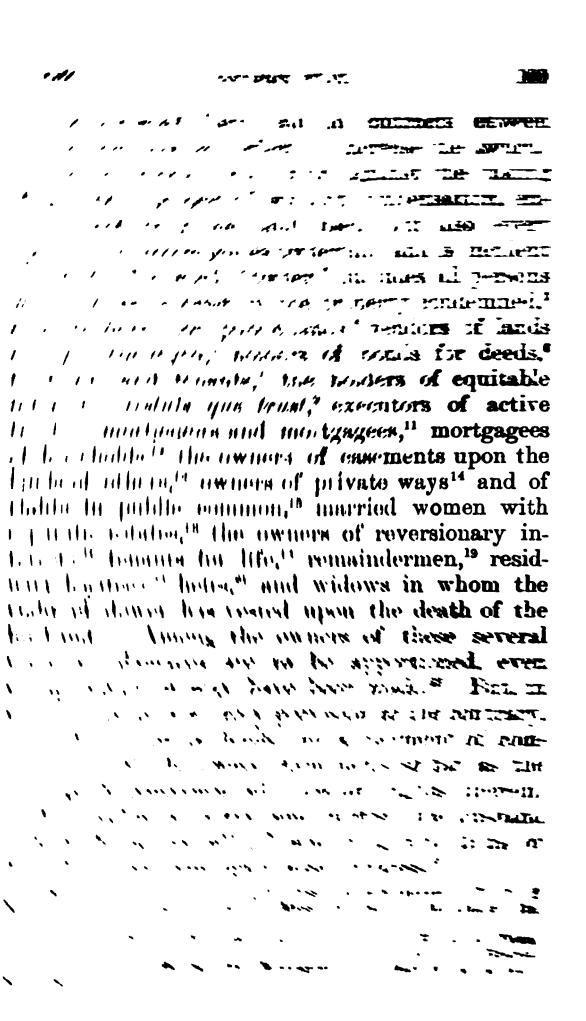
5 Dubuque etc. R'y Co. v. Diehl, 64 Iowa, 635.

CHAPTER XXX.

OF THE VARIOUS INTERESTS AND TITLES SUBJECT TO CONDEMNATION.

§ 793. Of the various interests or titles which constitute ownership.
§ 794. The same subject, continued—Sundry illustrations.
§ 795. The owner's right to compensation not to be impaired by other parties having an estate in the land.
§ 796. Condemnation of property of persons under disability.
§ 797. Of the power to take the property of another corporation.
§ 798. Modification of the foregoing proposition.
§ 799. Of the power to take the franchises of another corporation.
§ 800. Of the condemnation of exclusive privileges.
§ 801. Of compensation for the taking of corporate property.
§ 802. Of the power to take streets and highways.
§ 803. The same subject, continued.
§ 804. Of the consent of abutting property-holders.
§ 805. Of changing the grade of streets.
§ 806. Distinction between common and special injuries.
§ 807. Actions for damages to be brought against the company and not the city.
§ 808. Of the taking of streets for tramways.
§ 809. Of the taking of streets for elevated railways.
§ 810. Of compensation to abutting proprietors, the fee of the street being in the public.
§ 811. Of compensation to abutting proprietors, the fee of the street not being in the public.
§ 812. Of damages for wrongful taking of streets.

§ 793. Of the various interests or titles which constitute ownership.—In the land or property taken under the power of eminent domain, there may be various interests, in different individuals. But the value of the land, as a whole, is all that



3 Tompkins v. Augusta R'y Co. 21 S. C. 420; Gerrard v. Omaha R. R. 14 Neb. 270; Dietrichs v. Lincoln R. R. Co. 14 Neb. 355. An elaborate discussion of this topic will be found in Mills on Eminent Domain, §§ 65-77.

4 Burlington etc. R. R. Co. v. Johnson, 38 Kan. 142.

5 New York etc. R. R. Co. v. Stanley, 34 N. J. 55; Ten Brooke v. Jahke, 77 Pa. St. 392; Milw ukee etc. R. R. Co. v. Strange, 63 Wis. 178; Pomeroy v. Chicago etc. R. R. Co. 25 Wis. 641; Allyn v. Providence R. R. Co. 4 R. I. 457; McLindon v. Atlantic R. R. Co. 54 Ga. 293; Verdier v. Port Royal R. R. Co. 15 S. C. 476; Galveston etc. R. R. Co. v. Pfeuffer, 56 Texas, 66; Indiana etc. R. R. Co. v. Allen, 100 Ind. 409.

6 St. Louis R. R. Co. v. Wilder, 17 Kan. 239; Bird v. Great Eastern R. R. Co. 31 Law J. Com. P. 366; Tasker v. Small, 7 Law J. Ch. 19; Wiley v. South Eastern R. R. Co. 18 Law J. Ch. 201.

7 Baltimore etc. R.R. Co. v. Thompson, 10 Md. 76: Biddle v. Hussman, 23 Mo. 597; Lawrence v. Boston, 119 Mass. 126; Cobb v Boston, 109 Mass. 438; Parks v. Boston, 15 Pick. 198; Pennsylvania R. R. Co. v. Eby, 107 Pa. St. 166; Getz v. Philadelphia etc. R. R. Co. 105 Pa. St. 547; North Pennsylvania R. R. Co. v. Davis, 26 Pa. St. 238; Frost v. Earnest, 4 Whart. 86; Snell v. Wasatch etc. R. R. Co. 3 Utah, 192.

8 Sennott v. St. Johnsbury etc. R. R. Co. 59 Vt. 226; Martin v. London etc. R'y Co. 35 Law J. Ch. 795; 1 Law Rep. 1 Eq. 145.

9 Reed v. Hanover Branch R. R. Co. 105 Mass. 303.

10 People v. Robinson, 29 Barb. 77.

11 Adams v. St. Johnsbury etc. R. R. Co. 57 Vt. 240, 660; Platt v. Bright, 29 N. J. Eq. 128; Cool v. Crommet, 13 Me. 250.

12 Astor v. Hoyt, 5 Wend. 603; Hagar v. Brainard, 44 Vt. 294.

13 East Pennsylvania R. R. Co. v. Schollenberger, 54 Pa. St. 144; *Eaton v. Boston etc. R. R. Co.* 51 N. H. 504; 12 Am. Rep. 147; Thompson v. Androscoggin Co. 54 N. H. 545.

14 Philadelphia R. R. Co. v. Williams, 54 Pa. St. 103.

15 Bell v. Ohio R. R. Co. 1 Grant, 105.

16 Tennessee R. R. Co. v. Love, 3 Head, 63; State v. Hulick, 33 N. J. 307.

17 Hollingsworth v. Des Moines etc. R'y Co. 63 Iowa, 443, where, however, the reversion was not shown to be of any value, and damages were not allowed the grantor.

18 Colcough v. Nashville R. R. Co. 2 Head, 171; Burbridge v. New Albany R. R. Co. 9 Ind. 546; Harrisburg v. Crangle, 3 Watts & S. 460.

19 Bentonville R. R. Co. v. Baker, 45 Ark. 252.

20 Shelton v. Derby, 27 Conn. 414.

21 Boonville v. Ormrod's Adm'r, 26 Mo. 193.

22 New Orleans R. R. Co. v. Frederick, 46 Miss. 1; Columbia Bridge Co. v. Geisse, 35 N. J. 538.

23 State v. Runyon, 24 N. J. 256; State v. Garretson, 23 N. J. 388; Rentz v. City of Detroit, 43 Mich. 544, and cases cited *supra*.

24 McCracker v. Hayward, 2 How. 608; Towne v. Smith, 1 Wood. & M. 114; Lawrence v. Miller, 2 N. Y. 245; Moore v. New York, 4 Sand. (N. Y.) 456; Watson v. New York Central R. R. Co. 47 N. Y. 157.

25 Wood's Railway Law, 866; Watson v. New York Central R. R. Co. 47 N. Y. 157. As to the operation of a payment of an award by the company to a judgment 1 enor, see Chicago etc. R. R. Co. v. Chamberlain, 84 Ill. 333.

§ 794. The same subject, continued—Sundry illustrations.—A homesteader suffers an injury by the building of a railroad over his homestead which differs only in degree from that sustained by an owner who has a complete title.[1] If a railroad company enters upon leasehold premises, and does not first give security for damages, the tenant is such a "party interested" as will enable him to maintain an action of trespass against the company.[2] In a suit against a railroad company for damages to land appropriated by it, the tenant of the land may join with his landlord, and to this end it is not essential that his lease be in writing, if he is a tenant from year to year at a fixed yearly rent.[3] A lessee is to be allowed as damages the rent per acre for the balance of his term, without regard to the possible use of the land.[4] Although a railway company, in proceedings for condemnation, acquires no right to enter upon the land before payment of compensation, and the owner may treat the property as his own, yet the rights of a lessee, whose term has nearly expired at the time of the institution of proceedings, cannot, as against the company, be enlarged by the taking of a new lease.[5] And when a tract of land, through which a railroad passes, is sold, the vendor does not thereby acquire a right to the damages assessed, and which remain uncollected.[6] A landowner does not lose his right to damages for land taken by a railway company, by executing a conveyance of the property prior to an assessment of such damages.[7]

1 Burlington etc. R. R. Co. v. Johnson, 38 Kan. 142.
2 Pennsylvania R. R. Co. v. Eby, 107 Pa. St. 163.
3 Getz v. Philadelphia etc. R. R. Co. 105 Pa. St. 547.

4 Booker v. Venice etc. R. R. Co. 101 Ill. 333.
5 Schreiber v. Chicago etc. R. R. Co. 115 Ill. 340.
6 Indiana etc. R. R. Co. v. Allen, 100 Ind. 409.
7 Milwaukee etc. R. R. Co. v. Strange, 63 Wis. 178.

§ 795. The owner's right to compensation not to be impaired by other parties having an estate in the land.—Where a statute requires the permission of the "owner" of land before a railway company may enter thereupon, it is sufficient if the consent of the person having control of the land as an executor be obtained;[1] but a guardian cannot grant a right of way over the land of his ward.[2] Neither can a right of way be conveyed by the equitable owner, nor by a person having only a contingent interest.[3] The right of the remainderman to damages for land appropriated by a railway company for a right of way, cannot be impaired by a tenant for life.[4] Nor can a railroad company avoid payment of damages to a land-owner, under color of authority given it by a lessee of the land, who has himself only a license to quarry rock on the land, and a right of way to remove the rock.[5] So, also, a mortgagee of land which, prior to foreclosure, is taken by a railroad company, has a lien thereon for the damages resulting from the taking, and as to him, the amount of damages agreed upon between the mortgagor and the company is not binding.[6] And an equitable owner of land who becomes the legal owner has a lien for damages for land taken, enforceable against a company in possession by succession to the company first taking; but the value of the land actually taken, and not an agreement between the first company and the owner, is the measure of damages,

and interest is recoverable from time of possession of the latter company.[7]

1 Tompkins v. Augusta etc. R. R. Co. 21 S. C. 420.

2 Indiana etc. R'y Co. v. Allen. 100 Ind. 409.

3 Tapent v. Detroit etc. R. R. Co. 50 Mich. 267; Toledo etc. R. R. Co. v. Dunlap, 47 Mich. 457; Tutt v. Port Royal etc. R. R. Co. 16 S. C. 365.

4 Bentonville R. R. Co. v. Baker, 45 Ark. 252.

5 Snell v. Wasatch etc. R. R. Co. 3 Utah, 192.

6 Adams v. St. Johnsbury etc. R. R. Co. 57 Vt. 240, 660.

7 Sennott v. St. Johnsbury etc. R. R. Co. 59 Vt. 226.

§ 796. Condemnation of property of persons under disability.—When the lands of persons under the disabilities of infancy, coverture, *et cetera*, are taken under condemnation, it is the duty of the court to see to the application of the award.[1] If an infant whose land is sought to be condemned, have no guardian, a guardian *ad litem* should be appointed, upon whom process may be served.[2] But a decree in condemnation proceedings should not order the damages to be paid to the guardian *ad litem* of an infant owner. It should be kept in court until the appointment of a guardian, or until some one legally authorized appear to claim it.[3] Statutes requiring the company to make an effort to acquire its right of way by compromise with the land-owners before instituting condemnation proceedings, do not apply in a case where the owner is a minor; and even though he have a guardian, the company may condemn the land without a previous attempt to acquire it by purchase.[4]

1 Brown v. Rome etc. R. R Co. 86 Ala. 205; East Tennessee etc. R. R. Co. v. Love, 3 Head (Tenn.), 63; Mills on Eminent Domain, § 72. *Cf.* Watson v. New York Central R. R. Co. 47 N. Y. 157; East Tennessee etc. R. R. Co. v. Love, 3 Head (Tenn.), 63; Alabama etc. R. R. Co. v. Kenney, 39 Ala. 307; North Pennsylvania R. R. Co. v. Davis, 26 Pa. St. 238; Wood's Railway Law, 661.

2 Jones v. Barclay, 2 Marsh J. J. 73; Missouri Pacific R'y Co. v. Carter, 85 Mo. 448; Clark v. Gilmanton, 12 N. H. 515; Mills on Eminent Domain, § 72.

3 Brown v. Rome etc. R. R. Co. 86 Ala. 205.

4 Brown v. Rome etc. R. R. Co. 86 Ala. 205.

§ 797. Of the power to take the property of another corporation.—It is well settled that the legislature may authorize a railway company to take the property and franchises of another corporation, upon the payment of just compensation therefor, wherever, under similar circumstances, the property of a natural person might be condemned.[1] For, although the charter of a corporation is a contract between the State and the corporators, yet it, like other contracts, is made subject to the right of eminent domain in the State; and the property of a corporation and its franchises may therefore be taken for public uses, like the property of individuals, without violating the obligation of the contract.[2] And so, in turn, the property of a railway may be taken for a public use, such as the construction of another railway,[3] or ordinary highway.[4] Thus, a municipal corporation may lay out its streets across the right of way of a railroad company. It cannot, however, take the right of way longitudinally for that purpose without express legislative authority.[5] In several States the right of a railway to connect with others, or to cross them, is guarantied by the constitution.[6]

1 *Grand Rapids etc. R. R. Co. v. Grand Rapids R. R. Co.* 35 Mich. 265; 24 Am. Rep. 545, and note; *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400; *Evergreen Cemetery Assoc. v. New Haven*, 43 Conn. 234; 21 Am. Rep. 643; Boston Water Power Co. v. Boston etc. R. R. Co. 23 Pick. 360; *Springfield v. Connecticut River R. R. Co.* 4 Cush. 63; New York etc. R. R. Co. v. Boston etc. R. R. Co. 33 Conn. 196; *City of Bridgeport v. New York etc. R. R. Co.* 36 Conn. 255; 4 Am. Rep. 63; Backus v. Lebanon, 11 N. H. 19; 35 Am. Dec. 466; In re Kerr, 42 Barb. 119; *Bloodgood v. Mohawk etc. R. R.*

Co. 18 Wend. 9; 31 Am. Dec. 313, annotated; *Eastern R'y Co. v. Boston etc. R. R. Co.* 111 Mass. 125; 15 Am. Rep. 13; Chicago etc. R. R. Co. v. Town of Lake, 71 Ill. 333; Sixth Ave. R. R. Co. v. Kerr, 72 N. Y. 330; Oregon Cascade R. R. Co. v. Bailey, 3 Or. 164; Northern R. R. Co. v. Concord etc. R. R. Co. 27 N. H. 183; Eastern R. R. Co. v. Boston etc. R. R. Co. 111 Mass. 125; 15 Am. Rep. 13; Commonwealth v. Dickinson, 9 Phila. 561; *Oakland R. R. Co. v. Oakland etc. R. R. Co.* 45 Cal. 365; 13 Am. Rep. 181. Such authority cannot be conferred except by the legislature. Neither a board of public works (State v. Cincinnati Central R'y Co. 37 Ohio St. 157) nor a city council have any power to authorize the taking of the property of one corporation by another: Central City Horse R'y Co. v. Fort Clark Horse R'y Co. 81 Ill. 523. *Cf. Evergreen Cemetery Assoc. v. New Haven*, 43 Conn. 234; 21 Am. Rep. 643.

2 West River Bridge Co. v. Dix, 6 How. 507; Miller v. New York etc. R. R. Co. 21 Barb. 513; Alabama etc. R. R. Co. v. Kenny, 39 Ala. 307; State v. Noyes, 47 Me. 139; Pierce v. Somersworth, 10 N. H. 369; Crosley v. Hanover, 36 N. H. 404; Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; *Armington v. Barnet*, 15 Vt. 745; 40 Am. Dec. 705; White River Turnpike Co. v. Vermont etc. R. R. Co. 21 Vt. 590; James River etc. Co. v. Thompson, 3 Gratt. 270.

3 Sixth Ave. R. R. Co. v. Kerr, 45 Barb. 138; Kerr's Case, 42 Barb. 119; Metropolitan City R. R. Co. v. Chicago etc. R. R. Co. 87 Ill. 317; Baltimore etc. T. Co. v. Union R. R. Co. 35 Md. 224; 6 Am. Rep. 397; State v. Eastern etc. R. R. Co. 36 N. J. 181; Grand Junction R. R. Co. v. County Comm'rs, 14 Gray, 553; Massachusetts etc. R. R. Co. v. Boston etc. R. R. Co. 121 Mass. 124; Lake Shore etc. R. R. Co. v. Cincinnati etc. R. R. Co. 30 Ohio St. 604; Newcastle etc. R. R. Co. v. Peru etc. R. R. Co. 3 Ind. 464; Alabama etc. R. R. Co. v. Kenney, 39 Ala. 307; Union Pacific R. R. Co. v. Burlington etc. R. R. Co. 3 Fed. Rep. 106; Northern Pacific R. R. Co. v. St. Paul etc. R. R. Co. 3 Fed. Rep. 702; In re Towanda Bridge Co. 37 Leg. Int. (Pa.) 339; *Lexington etc. R. R. Co. v. Applegate*, 8 Dana (Ky.), 289; 33 Am. Dec. 497; Commonwealth v. Pittsburgh etc. R. R. Co. 58 Pa. St. 26; *Commonwealth v. Pennsylvania Canal Co.* 66 Pa. St. 41; 5 Am. Rep. 329; Crosby v. Hanover, 36 N. H. 404.

4 Philadelphia etc. R. R. Co. v. Philadelphia, 47 Pa. St. 325; Iron R. R. Co. v. Ironton, 19 Ohio St. 299; Old Colony etc. R. R. Co. v. Plymouth, 14 Gray (Mass.), 144; Chicago etc. R. R. Co. v. Lake, 71 Ill. 333; Commonwealth v. Essex Co. 13 Gray, 239.

5 In re City of Buffalo, 68 N. Y. 167; Atlanta v. Central R. R. Co. 53 Ga. 120; Northern etc. R. R. Co. v. Baltimore, 46 Md. 425; Danbury etc. R. R. Co. v. Norwalk, 37 Conn. 109; *City of Bridgeport v. New York etc. R. R Co.* 33 Conn. 255; 4 Am. Rep. 63.

6 Stimson's Am. Stat. Law (1836) § 466, citing the constitutions of Ala., Mo., Ark., Tex., La., Cal., Pa. and Colo.

§ 798 **Modification of the foregoing proposition.**—But a distinction is drawn between property held by the other corporation for private purposes and such as is already dedicated to a public use. The former may be condemned and taken by the railway under a general grant of the power of eminent domain, in the same manner as the property of

a natural person may be acquired;[1] the property rights of a corporation in lands not devoted to a public use being no more sacred than the rights of natural persons;[2] but property necessary for the enjoyment of its essential franchises and the performance of its duty to the public, cannot be taken without especial legislative authority to do so,[3] granted in express words,[4] or *necessarily* implied from the circumstances of the case;[5] unless the proposed appropriation would not destroy, or greatly injure the franchise of the other company, or render it difficult to prosecute the object thereof. If such consequences would not follow, a general grant is sufficient.[6] And the right of one railroad to cross another, may be implied when a longitudinal taking cannot be justified. There is often a necessity for one when there is no necessity for the other, and the instances are rare in which a longitudinal taking can be justified.[7] In this country, as in England, every grant from the sovereign power is, in case of ambiguity, to be construed strictly against the grantee and in favor of the government. The rights of the public are, therefore, not to be presumed to have been surrendered to a corporation, except so far as an intention to surrender them clearly appears in the charter. The grant of a franchise from the commonwealth for one public object, is not to be unnecessarily interpreted to the disparagement of another.[8]

1 In re New York etc. R'y Co. 99 N. Y. 12; In re Rochester Water Commissioners, 66 N. Y. 413; New York Central R. R. Co. v. Metropolitan Gas Light Co. 63 N. Y. 326; North Carolina R. R. Co. v. Carolina Central R. R. Co. 83 N. C. 489; *Grand Rapids etc. R. R. Co. v. Grand Rapids etc. R. R. Co.* 35 Mich. 265; 24 Am. Rep. 545, and note; Peoria etc. R. R. Co. v. Peoria etc. R. R. Co. 66 Ill. 174; Boston etc. R. R. Co. v. Old Colony R. R. Co. 12 Cush. 605.

2 In re Rochester Water Commissioners, 66 N. Y. 413.

3 In re Boston etc. R. R. Co. 53 N. Y. 574; Lake Shore etc. R. R. Co. v. New York etc. R. R. Co. 8 Fed. Rep. 858; In re Cleveland etc. R. R. Co. 2 Pittsb. (Pa.) 348; Central City Horse R'y Co. v. Fort Clark Horse R'y Co. 8 Ill. 523.

4 *Springfield v. Connecticut River R. R. Co.* 4 Cush. 63.

5 As when between the designated *termini* it would be impossible to construct the road unless the property of another railway be taken: *Springfield v. Connecticut etc. R. R. Co.* 4 Cush. 63; Central City Horse R'y Co. v. Ft. Clark Horse R'y Co. 81 Ill. 523; New York etc. R. R. Co. v. Boston etc. R. R. Co. 36 Conn. 196; *Bridgeport v. New York etc. R. R. Co.* 36 Conn. 255; 4 Am. Rep. 63; Worcester R. R. Co. v. Railroad Comm'rs, 118 Mass. 561; Pennsylvania R. R. Co's Appeal, 3 Am. & Eng. R. R. Cas 507. See, also, Chicago etc. R'y Co. v. Chicago R. R. Co. 112 Ill. 539; Little Miami etc. R. R. Co. v. Dayton, 23 Ohio St. 510; Morris etc. R. R. Co. v. Newark, 10 N. J. Eq. 352; Chicago etc. R. R. Co. v. Joliet, 79 Ill. 25; Rex v. Pease, 4 Barn. & Adol. 30; New York etc. R. R. Co. v. Boston etc. R. R. Co. 36 Conn. 136; Contra Costa R. R. Co. v. Moss, 23 Cal. 323; White River Turnpike Co. v. Vermont Central R. R. Co. 21 Vt. 590; Central City Horse R. R. Co. v. Ft. Clark Horse R. R. Co. 81 Ill. 523; Commonwealth v. Old Colony etc. R. R. Co. 14 Gray, 93.

6 Richmond etc. R. R. Co, v. Louisa R. R. Co. 13 How. (U. S.) 71; *Enfield Toll Bridge Co. v. Hartford etc. R. R. Co.* 17 Conn. 40; 42 Am. Dec. 716; Little Miami R. R. Co. v. Day, 23 Ohio St. 510; *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.* 11 Leigh, 42, 79; 36 Am. Dec. 374; 8 C. 3 Gratt. 258.

7 In re City of Buffalo, 68 N. Y. 167; Housatonic R. R. Co. v. Lee etc. R. R. Co. 118 Mass. 391; Worcester etc. R. R. Co. v. Railroad Comm'rs, 118 Mass. 361; Boston etc. R. R. Co. v. Lowell etc. R. R. Co. 124 Mass. 368; *Commonwealth v. Erie etc. R. R. Co.* 27 Pa. 30, 339; 67 Am. Dec. 471; *Cleveland etc. R. R. Co. v. Speer,* 56 Pa. St. 325; 94 Am. Dec. 84; Cake v. Philadelphia etc. R. R. Co. 87 Pa. St. 307; Tennessee etc. R. R. Co. v. Adams, 3 Head, 596; Oregon etc. R. R. Co. v. Bailey, 3 Or. 164; Contra Costa R. R. Co. v. Moss, 23 Cal. 323; Starr v. Camden etc. R. R. Co. 9 N. J. 592; Hoboken Land Co. v. Hoboken, 35 N. J. 205; National R. R. Co. v. Easton etc. R. R. Co. 36 N. J. 181; Attorney-General v. Morris etc. R. R. Co. 19 N. J. Eq. 336; Newark etc. R. R. Co. v. Newark, 24 N. J. Eq. 515; Greenwich v. Easton etc. R. R. Co. 23 N. J. Eq. 217; 25 N. J. Eq. 565; Green v. Wycombe R'y Co. Law R. 9 Q. B. 210; Pugh v. Golden Valley R. R. Co. 12 Ch. Div. 274; Attorney-General v. Ely etc. R. R. Co. Law R. 3 Ch. 194.

8 *Commissioners of Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446; 6 Am. Rep. 247; In re Ninth Av. 45 N. Y. 729; In re New York etc. R. R. Co. 77 N. Y. 248; In re City of Buffalo, 68 N. Y. 167; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 544, 548; Perrine v. Chesapeake etc. Canal Co. 9 How. (U. S.) 172, 192; Richmond etc. R. R. Co. v. Louisa R. R. Co. 13 How. (U. S.) 71; Cleveland v. Norton, 6 Cush. (Mass.) 383, 394; Boston v. Richardson, 13 Allen (Mass.) 146, 156; State v. Noyes, 47 Me. 189; Worcester R. R. Co. v. Railroad Comm'rs, 118 Mass. 561; Milwaukee R. R. Co. v. Faribault, 23 Minn. 167; Parker v. Sunbury etc. R. R. Co. 19 Pa. St. 211; Hatch v. Cincinnati etc. R. R. Co. 18 Ohio St. 92; *Comm'rs v. Holyoke Water Power Co.* 104 Mass. 446; 6 Am. Rep. 247; Chicago etc. R. R. Co. v. Joliet, 49 Ill. 25; Little Miami etc. R. R. Co. v. Dayton, 23 Ohio St. 510.

§ 799. Of the power to take the franchises of another corporation.—With respect to condemna-

tion under the power of eminent domain, there is no distinction between corporeal and incorporeal property, and a franchise is subject to the power of eminent domain as well as any other property. No species of property is withdrawn from it, unless by express provision of the constitution.[1] Thus, the legislature may authorize a railway company to appropriate a franchise to build and maintain a bridge, previously granted to another corporation.[2] The franchises of another corporation cannot, however, be condemned by a railway company under a general grant of the power of eminent domain. There must be an especial legislative authorization,[3] either in express words, or from necessary implication.[4] But, as a general rule, where the grant of a new franchise does not in express terms give to the corporation the right to take the franchise of a corporation already established, the presumption is, that the new corporation was not expected to interfere in any substantial degree with the franchises of the elder one.[5] Thus, the taking by one railway of the lands of another not devoted to a public use, does not include the condemnation of the franchises of the latter. All that is acquired thereby is a right of way, and, incidentally, the power to cross the track of the other where the two routes intersect.[6] The taking of the franchise or property of one corporation for the use of another is not a repeal of its charter, but only an enforced purchase of its property.[7]

1 *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 9; 31 Am. Dec. 313 (annotated); Richmond R. R. Co. v. Louisa R. R. Co. 13 How. 71; West River Bridge Co. v. Dix, 6 How. 507; *Red River Bridge Co. v. Clarksville*, 1 Sneed, 176; 60 Am. Dec. 143; Central Bridge v. Lowell, 4 Gray, 474; Barber v. Andover, 8 N. H. 398; *Armington v. Barnet*, 15 Vt. 745; 40 Am. Dec. 705; Salem Turnpike Co. v. Lyme, 18 Conn. 451; James River Co. v. Johnson, 3 Gratt. 270; Newcastle R. R. Co. v. Peru R. R. Co. 3 Ind. 464; *Tuck-*

ahoe Canal Co. v. Tuckahoe etc. R. R. Co. 11 Leigh, 42; 36 Am. Dec. 74; S. C. 3 Gratt. 258; *La Fayette Plank Road Co. v. New Albany R. R. Co.* 13 Ind. 90; 74 Am. Dec. 246; State v. Canterbury, 28 N. H. 195; West River Bridge v. Dix, 16 Vt. 446; Black v. Delaware & R. Canal Co. 22 N. J. Eq. 130.

2 Bonaparte v. Camden etc. R. R. Co. 1 Bald. 205; Pierce v. Somersworth, 10 N. H. 370; S. C. 11 N. H. 20; Crosby v. Hanover, 36 N. H. 404; James River & Kansas Co. v. Thompson, 3 Gratt. 270; Newcastle R. R. Co. v. P. & J. R. R. Co. 3 Ired. 461; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R.* Co. 11 Leigh, 42; 36 Am. Dec. 74; S. C. 3 Gratt. 258; Boston etc. R. R. Co. v. Salem etc. R. R. Co. 2 Gray, 1; *Springfield v. Connecticut River R. R. Co.* 4 Cush. 63; Central Bridge Co. v. Lowell, 4 Gray, 474; Northern R. R. Co. v. Claremont etc. R. R. Co. 27 N. H. 183; *Red River Bridge Co. v. Clarksville*, 1 Sneed, 176; 60 Am. Dec. 143; Barber v. Andover, 8 N. H. 398; *Armington v. Barnet*, 15 Vt. 745; 40 Am. Dec. 705; *Backus v. Lebanon*, 11 N. H. 19; 35 Am. Dec. 466.

3 In re Boston etc. R. R. Co. 53 N. Y. 574. In re City of Buffalo, 68 N. Y. 167; Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co. 81 Ill. 523.

4 *Evergreen Cemetery Assoc. v. New Haven*, 36 Conn. 242; 21 Am. Rep. 643.

5 Wood's Railway Law, 699, citing In re New York etc. R. R. Co. 20 Hun, 201; In re Boston etc. R. R. Co. 53 N. Y. 574; State v. Montclair R. R. Co. 21 N. J. Eq. 328; Parker v. Sunbury etc. R. R. Co. 19 Pa. St. 211; Hatch v. Cincinnati etc. R. R. Co. 18 Ohio St. 92; *Comm'rs of Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446; 6 Am. Rep. 247; *Alexandria etc. R. R. Co. v. Alexandria etc. R. R. Co.* 75 Va. 730; 40 Am. Rep. 743.

6 State v. Easton etc. R. R. Co. 36 N. J. 181; Wood's Railway Law, 680.

7 State v. Hudson Tunnel Co. 38 N. J. 548; Grand Junction R. R. Co. v. Middlesex, 14 Gray, 553; Wood's Railway Law, 680.

§ 800. Of the condemnation of exclusive privileges.—While a grant of privileges to a corporation may be exclusive, and the legislature may not have reserved to itself the right to alter, amend, or repeal its charter, and even though there may be an express stipulation in the charter that no other similar corporation shall be established within a certain distance of it, yet it is held that the grant shall be presumed to have been made upon the condition that no similar corporation shall be established, *without proper compensation to it*, and that the establishment of another corporation within the distance named, which provides for just compensation to such corporation for the injury to its franchise, does not impair the obliga-

tion of any contract, but leaves the corporation subject, as it should be, to all the incidents of citizenship, and to the exercise of sovereign powers for the public good.[1] In an Illinois case in point it was said: "Unless every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the State would be an obstacle in the way of its future prosperity of no inconsiderable magnitude. The claim made for damages in this respect has neither reason nor the weight of authority for its support. It is well said, 'while the elder road can demand compensation for its property to the extent of its appropriation, it has no right to demand tribute from the junior road for the enjoyment of the same corporate franchises which it possesses.'"[2]

1 Richmond etc. R. R. Co. v. Louisa etc. R. R. Co. 13 How. 71; Wood's Railway Law, 696; *Backus v. Lebanon*, 11 N. H. 19; 35 Am. Dec. 466; Newcastle R. R. Co. v. Peru R. R. Co. 3 Ind. 464; Charles River Bridge v. Warren Bridge, 7 Pick. 344; State v. Hudson Tunnel Co. 33 N. J. 548; Proprietors of Locks v. Lowell, 7 Gray, 223; White River Turnpike Co. v. Vermont Central R. R. Co. 21 Vt. 590.

2 *Chicago etc. R. R. Co. v. Joliet etc. R. R. Co.* 105 Ill. 388; 44 Am. Rep. 799; Lake Shore etc R'y Co. v. Cincinnati etc. R'y Co. 30 Ohio St. 604. *Cf.* Massachusetts Central R. R. Co. v. Boston etc. R. R. Co. 121 Mass. 125.

§ 801. Of compensation for the taking of corporate property.—A corporation whose property is taken by another company under the power of eminent domain is entitled to compensation therefor in the same manner as a natural person. Where one railroad company takes land of another or crosses its track, the same principles are to be

applied as in case of individuals and natural persons. The measure of damage where one railroad takes the land of another is the value of the land on the day it was taken.[1] For example, where one railroad company leases to another its right to use a street for its tracks, there vests in the latter such a right of property as cannot be taken by a third company for the purpose of crossing the tracks with its road, without making compensation.[2] And a statute authorizing a telegraph company to erect its lines upon the way of a railroad company, without providing for enforcing payment of damages, has been held unconstitutional and void.[3] So also, a railway company cannot be deprived of a route, along which it has surveyed and staked out a branch line, by a purchase of the same land by another company and a procedure by it to lay its tracks thereon.[4] But a location by a railroad company of its route before obtaining its charter, is of no effect as against another company subsequently selecting the same location, even though it ratify the same after incorporation.[5] Nor can there be any recovery against a railroad company for constructing its track across and at an altitude of fourteen feet above the grade of another road, which has been merely projected, when at the point of intersection no work has been done thereon, and no steps taken to procure the right of way.[6] In assessing damages in a case where one railroad crosses another, the total obstruction of the road while the tracks are being laid and the permanent interference by means of the crossing, with the business of the railroad crossed, are proper elements of damage, for which

compensation must be made,[7] notwithstanding that the other company may have agreed to construct and maintain at its own expense all necessary frogs and crossings.[8]

1 Texas etc. R. R. Co. v. Matthews, 60 Texas, 215.

2 Chicago etc. R. R. Co. v. Englewood etc. R'y Co. 17 Ill. App. 141; S. C. 115 Ill. 376; 56 Am. Rep. 173.

3 *Southwestern R. R. Co. v. Southern Telegraph Co.* 46 Ga. 4; 12 Am. Rep. 585.

4 Sioux City etc. R'y Co. v. Chicago etc. R'y Co. 27 Fed. Rep. 770.

5 New Brighton etc. R. R. Co. v. Pittsburgh etc. R. R. Co. 105 Pa. St. 13.

6 St. Louis etc. R. R. Co. v. Peach Orchard etc. R. R. Co. 42 Ark. 249.

7 *Chicago etc. R. R. Co. v. Englewood Connecting R'y Co.* 115 Ill. 376; 56 Am. Rep. 173; Lake Shore etc. R. R. Co. v. Chicago etc. R. R. Co. 100 Ill. 21; St. Louis etc. R. R. Co. v. Springfield etc. R. R. Co. 96 Ill. 274; S. C. 2 Am. & Eng. R. R. Cas. 487; Chicago etc. R. R. Co. v. Chicago etc. R. R. Co. 15 Ill. App. 537. On a petition under the Act of Congress of August 10, 1888, for the condemnation of Lock and Dam No. 7 of Monongahela Navigation Company, on the Monongahela River, between Pittsburgh, Pennsylvania, and Morgantown, West Virginia, and objection being made that the act is unconstitutional in the proviso that, in estimating the sum to be paid, the franchise of the corporation to collect tolls shall not be considered, the court held that, as the question was not free from doubt, and as it was not clear that the proviso, if unconstitutional, might not be eliminated so as to save the main purpose of the law, it would arrest the proceeding, but would overrule the objections, without prejudice to respondent's right to renew them thereafter: *Re Condemnation of Lock and Dam No. 7* (Cir. Ct. W. D. Pa.) 46 Phila. Leg. Int. 69.

8 *Chicago etc. R. R. Co. v. Englewood Connecting R'y Co.* 115 Ill. 375; 56 Am. Rep. 173.

§ 802. Of the power to take streets and highways.—There is a strong line of authorities to the point that where the fee in a public street or highway is vested in a municipality or in the public, the legislature may authorize its appropriation by a railroad,[1] although the easement of the abutting property-holders be thereby partially impaired and their lots rendered less valuable. For, it is held, the fee to the street being public property, the legislature, in authorizing its use by railroads, does not violate the constitutional prohibition with respect to the taking of private property without

just compensation therefor; and the injury to the abutting landholder is considered to be a mere incidental or consequential damage, *damnum absque injuria*,[2] his only remedy being for any improper or negligent use which the railroad may make of its privilege.[3] The line of cases cited above do not recognize the principle that although the fee may be in the public, yet that the interest of abutting proprietors in the maintenance of an open street or highway as a servient tenement, an incorporeal hereditament appurtenant to their lands, and an integral part of their estate, constitutes a property right, which cannot be taken without compensation. There are, however, cases in which this principle has been made the ground of requiring compensation to be rendered.[4]

1 Clinton v. Cedar Rapids R. R. Co. 24 Iowa, 455 (qualifying Milburn v. Cedar Rapids, 12 Iowa, 246, where the court indicated that the consent of the city was necessary); People v. Kerr, 27 N. Y. 188; Drake v. Hudson River R. R. Co. 7 Barb. 508; Barr v. Oskaloosa, 45 Iowa, 275; Savannah R. R. Co. v. Savannah, 45 Ga. 602; Chicago R. R. Co. v. Joliet, 79 Ill. 25; Stetson v. Chicago R. R. Co. 75 Ill. 74; *Stone v. Fairbury R. R. Co.* 68 Ill. 394; 18 Am. Rep. 556; Grand Rapids R. R. Co. v. Heisel, 47 Mich. 393; Carson v. Central R. R. Co. 35 Cal. 325; Atchison R. R. Co. v. Garside, 10 Kan. 552; Davenport v. Stevenson, 34 Iowa, 225; Hine v. Keokuk R. R. Co. 42 Iowa, 636; Ingram v. Chicago etc. R. R. Co. 38 Iowa, 669; Denver v. Bayer, 7 Colo. 113; Franz v. Sioux City R'y Co. 55 Iowa, 107; Spencer v. Point Pleasant R. R. Co. 23 W. Va. 406.

2 *Houston etc. R. R. Co. v. Odum*, 53 Tex. 343; Killinger v. Forty-Second St. R. R. Co. 50 N. Y. 208; People v. Kerr, 27 N. Y. 188; S. C. 37 N. Y. 357; Milburn v. Cedar Rapids, 12 Iowa, 246; *Lexington R. R. Co. v. Applegate*, 8 Dana, 289; 33 Am. Dec. 497; Mills on Eminent Domain, § 201; Porter v. North Missouri R. R. Co. 33 Mo. 128; *Philadelphia etc. R. R. Co.* 6 Whart. 25; 36 Am. Dec. 202; Tate v. Ohio R. R. Co. 7 Ind. 479; *Cleveland R. R. Co. v. Speer*, 56 Pa. 325; 94 Am. Dec. 84; Mifflin v. Railroad, 16; Pa. St. 182; Snyder v. Pennsylvania R. R. Co. 55 Pa. St. 340; Mercer v. Pittsburgh R. R. Co. 36 Pa. St. 99; Struthers v. Dunkirk R. R. Co. 87 Pa. St. 282; Louisville R. R. Co. v. Brown, 17 Mon. B. 763; *Slatten v. Des Moines R. R. Co.* 29 Iowa, 148; 4 Am. Rep. 205; Parrot v. Cincinnati R. R. Co. 10 Ohio St. 624; Rio Grande R. R. Co. v. Brownsville, 45 Tex. 88; Hanlin v. Chicago R'y Co. 61 Wis. 515; Tate v. Missouri R'y Co. 64 Mo. 149; Dwenger v. Chicago R'y Co. 93 Ind. 153; Hatch v. Vermont etc. R. R. Co. 28 Vt. 142; New York etc. R. R. Co. v. Young, 33 Pa. St. 130; Shearman & Redfield on Negligence, § 379; 2 Dillon on Municipal Corporations, § 564; Cooley on Constitutional Limitations, 542, *et seq.*; 1 Thompson on Negligence, § 358; Wood on Nuisance, §§ 753, 755.

3 Killinger v. Forty-Second St. R. R. Co. 50 N. Y. 306; Sweet v. Buf-

falo etc. R. R. Co. 13 Hun, 643; Broiestedt v. South Side R. R. Co. 55 N. Y. 220; Carpenter v. Oswego etc. R. R. Co. 24 N. Y. 655; Wager v. Troy etc. R. R. Co. 25 N. Y. 526; Pratt v. Buffalo City R. R. Co. 19 Hun, 30; Williams v. New York etc. R. R. Co. 16 N. Y. 97; 69 Am. Dec. 651; *Grand Rapids etc. R. R. Co. v. Heisel*, 38 Mich. 62; 31 Am. Rep. 306; Kuchman v. C. C. & D. R. R. Co. 46 Iowa, 366; *Harrison v. New Orleans etc. R. R. Co.* 34 La. An. 462; 44 Am. Rep. 438; Patterson v. Chicago etc. R. R. Co. 75 Ill. 588; Atchison etc. R. R. Co. v. Garside, 10 Kan. 552; Carson v. Central R. R. Co. 35 Cal. 325; Moses v. Pittsburgh etc. R. R. Co. 21 Ill. 516; Indianapolis R. R. Co. v. Hartley, 67 Ill. 439; 16 Am. Rep. 624; Stetson v. Chicago etc. R. R. Co. 75 Ill. 74; Davis v. Chicago etc. R. R. Co 46 Iowa, 389; Clinton v. Cedar Rapids R. R. Co. 24 Iowa, 455; *Ford v. Chicago etc. R. R. Co.* 14 Wis. 609; 80 Am. Dec. 791; Hegar v. Chicago etc. R. R. Co. 26 Wis. 624; Harrington v. St. Paul etc. R. R. Co 17 Minn. 215; Kaiser v. St. Paul etc. R. R. Co. 32 Minn. 149; Cox v. Louisville etc. R. R. Co. 48 Ind. 178.

4 Child v. Chappell, 90 N. Y. 246; Hills v. Miller, 3 Paige, 256; Trustees of Watertown v. Cowen, 4 Paige, 514.

§ 803. **The same subject, continued.**—A prudent running of cars through a city is not a purpresture or a nuisance.[1] And unless the use operates as an obstruction or an exclusive use, it will not be interfered with. An occasional blocking of streets may be produced by long lines of wagons or coaches, and the damage or obstruction would not be different from the obstruction by trains of cars, and neither obstruction would constitute a ground for damage.[2] In Louisiana, under the statute[3] authorizing the construction of a railroad upon any street, highway, turnpike, or canal, on the condition that it operate in no way to impair unnecessarily the usefulness thereof to the public, if there result serious and unequal damages to private property, an action may be instituted by the owners for a reconstruction of the track, and, under certain conditions, for its eventual removal.[4] In Iowa, by statute,[5] where land abutting on a street is taken by a railway company, and its road is constructed in part on the land so taken, and in part on the street, the owner of the land

may recover damages also for injuries resulting from the use of the street.[6] But the statutory provision in that State,[7] prohibiting the construction of a railroad on any street, alley, or public place, "until after the injury to property abutting on the street, alley, or public place" shall have been assessed and paid for, does not apply to the owners of property abutting on a street, which the road only crosses.[8] No recovery can be had by a person whose property abuts on the opposite side of a street, which is slightly encroached upon by the road-bed of a railway company.[9]

1 Chicago R. R. Co. v. Joliet, 79 Ill. 25; *Murphy v. Chicago*, 29 Ill. 279; 81 Am. Dec. 307; Moses v. Pittsburgh R. R. Co. 21 Ill. 516; Mills on Eminent Domain, § 201.

2 *Lexington R. R. Co. v. Applegate*, 8 Dana, 289; 33 Am. Dec. 437; Chicago R. R. Co. v. Joliet, 79 Ill. 25; Mills on Eminent Domain, § 201.

3 La. Acts 1876, ch. 14, § 6.

4 Hepting v. New Orleans Pacific R'y Co. 36 La. An. 898.

5 Iowa Code, § 464.

6 McClean v. Chicago etc. R'y Co. 67 Iowa, 568.

7 Iowa Code, § 464.

8 *Morgan v. Des Moines etc. R'y Co.* 64 Iowa, 589; 52 Am. Rep. 462.

9 Rinard v. Burlington etc. R'y Co. 66 Iowa, 440.

§ 804. Of the consent of abutting property-holders.—Where a city charter provides for the laying of tracks through the streets in case a majority of the land-owners consent thereto, and it contains no provision for condemnation, the requisite consent must be obtained before a track can be laid.[1] An affidavit, setting forth a refusal by the requisite number of abutters to agree to the location of a road through city streets, must state facts and not mere deductions and conclusions.[2] Under the New York constitution it is necessary either to obtain the consent of the owners of abutting property

to the amount of one-half in value, or to institute proceedings in the supreme court.[3] The New York statute,[4] relative to surface railroads in towns and villages, does not set forth the order for taking the measures prescribed; and on a refusal by the property-owners to consent to the building of the road, it is permissible to request the court to appoint commissioners, even before securing the consent of the municipal authorities.[5]

1 Chamberlain v. Elizabethport Steam Cordage Co. 41 N. J. Eq. 43
2 In re New York Cable R'y Co. 36 Hun, 355.
3 N. Y. Const. (1846) art. iii, § 18.
4 N. Y. Laws, 1884, ch. 252.
5 In re Broadway Surface R. R. Co. 34 Hun, 414.

§ 805. Of changing the grade of streets.—A railway company can exercise authority conferred upon it to change the grade of streets, only upon payment of the damages assessed therefor.[1] But no action can be maintained against a railway company by a person on the ground that the grade of the street in front of his property in a city was raised, the work having been properly executed by the company, without impairing the use of the street for travel, and under authority from the city, after having acquired all private rights therein.[2]

1 Jersey City v. Central R. R. Co. 40 N. J. Eq. 417.
2 Uline v. New York Central & H. River R. R. Co. 101 N. Y. 98.

§ 806. Distinction between common and special injuries.—No cause of action occurs in favor of one, who in common with others, suffers from the construction of a railroad across streets in the neighborhood of, but not abutting on his property,

which is in fact, neither appropriated nor in any way directly interfered with.[1] And no recovery can be had by an owner of a lot abutting on a street, through which a railroad company has been permitted by the city to build its road, for an injury sustained in common with him by the other lot-owners along the street.[2] But a city has no power to grant to a railway company a right of way in a public street without payment of damages to the owners of such abutting property as is especially injured thereby.[3] And the fact that a railroad company constructed its tracks through the streets of a city, under authority of the legislature, does not relieve it from liability to a holder of property for any peculiar loss sustained by him.[4]

1 Rochette v. Chicago etc. R'y Co. 32 Minn. 201; In re New York etc. R. R. Co. 39 Hun, 338.

2 Devenger v. Chicago etc. R'y Co. 98 Ind. 153.

3 Omaha etc. R. R. Co. v. Rogers, 16 Neb. 117.

4 Gulf etc. R'y Co. v. Fuller, 63 Tex. 467; where, however, it was said that allowance might be made for the enhanced value.

§ 807. Actions for damages to be brought against the company and not the city.—The railroad company, and not the city, is the proper party responsible for damages to the owner of property abutting on a street, through which the company with the consent of the city lays its tracks.[1] But where a railway company was illegally permitted by a city to run cars through a public street in the interest of a private party, it was held that a suit in equity could be maintained by a land-owner, and that the city, the railway company, and the private party could be joined as co-defendants.[2]

1 Denver v. Bayer, 7 Col. 113.

2 Macon v. Harris, 73 Ga. 428.

§ 808. Of the taking of streets for tramways. A railway appropriating a street or highway, cannot be regarded as standing in the place of that public to which it was originally dedicated. Although a railway company is, in many respects, a public corporation, yet its ownership is private, and its possession of a street or highway is to a large extent exclusive.[1] Tramways, however, are regarded as merely new and improved means of travel, not inconsistent with the uses to which streets or highways were originally dedicated. Accordingly, whether the fee of a street be in the municipality or in the abutting property-holders, the legislature may authorize the construction of a horse railway without compensation to the adjoining owners or to the municipality, and against the will of both.[2]

1 Trustees of Presbyterian Society v. Auburn etc. R. R. Co. 3 Hill (N. Y.), 567; Fletcher v. Auburn etc. R. R. Co. 25 Wend. 462; and cases cited *supra*, § 802.

2 Kellinger v. Forty-Second Street R. R. Co. 50 N. Y. 206; People v. Kerr, 27 N. Y. 188; Wetmore v. Story, 22 Barb. 414; Milhan v. Sharp, 15 Barb. 193; Mills on Eminent Domain, § 203; *Eichels v. Evansville Street R. R. Co.* 78 Ind. 261; 44 Am. Rep. 561; Elliott v. Fairhaven etc. R. R. Co. 32 Conn. 579; *Hiss v. Baltimore etc. R. R. Co.* 52 Md. 242; 36 Am. Rep. 371; *Attorney-General v. Metropolitan R R. Co.* 125 Mass. 515; 28 Am. Rep. 264; *Hobart v. Milwaukee City R. R. Co.* 27 Wis. 194; 9 Am. Rep. 461; Cincinnati etc. R. R. Co. v. Cumminsville, 14 Ohio St. 523; Hinchman v. Paterson Horse R. R. Co. 17 N. J. Eq. 75; Jersey City etc. R. R. Co. v. Jersey City etc. Horse R. R. Co. 20 N. J. Eq. 61; Peddicord v. Baltimore etc. R. R. Co. 34 Md. 463; Savannah etc. R. R. Co. v. Mayor, 45 Ga. 602; Brown v. Duplessis, 14 La. An. 842.

§ 809. Of the taking of streets for elevated railways.—The New York Rapid Transit Act of 1875 requires compensation to be made for all private property taken for the purpose of elevated railways;[1] and the highest court of that State has declared that its validity would not have been upheld, unless in the opinion of the court means

were provided to secure such compensation.[2] The extent to which the property is appropriated is not material. Neither the whole, nor any part of it, can be appropriated to the public use without compensation.[3] The interest of abutting proprietors in the maintenance of an open street in front of their lots as secured and paid for under the New York act of 1813, is such "property" as cannot be taken away, in whole or in part, for public use, without compensation.[4] The interest thus secured is an incorporeal hereditament appurtenant to the lot, and forms "an integral part of estate" in it. It follows the estate, and constitutes a perpetual incumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way, or street, the servient tenement.[5] While the legislature may regulate the uses of the street as a street, it has no power to authorize a structure thereon which is subversive of, and repugnant to the uses of the street as an open public street. Whether a particular structure authorized by the legislature is consistent, or inconsistent with the uses of the street as a street, must be largely a question of fact, depending upon the nature and character of the structure authorized.[6] If it be found that a series of iron columns abridges the use of the street, and that a superstructure erected thereon obscures the light to the adjoining premises, and depreciates the value of the abutting property, this amounts to a closing of the street *pro tanto*, and thus directly invades the abutting property-holder's easement.[7]

1 N. Y. Laws of 1875, ch. 606, § 6; N. Y. Laws of 1867, ch. 489.

2 *Story v. New York Elevated R. Co.* 90 N. Y. 132, 143; 43 Am. Rep. 146, alluding to the acts above cited, and to N. Y. Laws of 1850, ch. 140; Laws of 1866, ch. 697; Laws of 1867, ch. 489.

3 *Story v. New York Elevated R. Co.* 90 N. Y. 122, 170; 43 Am. Rep. 146.

4 Mr. Evarts' Brief for Appellant in Story v. New York Elevated R. Co. 90 N. Y. 122, 123; 43 Am. Rep. 146, citing Code of Civil Proc. §§ 162, 163, 164, 165, 166, 245, 247; Arnold v. Hudson R. R. S. Co. 55 N. Y. 661.

5 *Story v. New York Elevated R. Co.* 90 N. Y. 122, 145; 43 Am. Rep. 146; Child v. Chappell, 9 N. Y. 246; Hills v. Miller, 3 Paige, 256; Trustees of Watertown v. Cowen, 4 Paige, 514; 27 Am. Dec. 80.

6 *Story v. New York Elevated R. Co.* 90 N. Y. 122, 170; 43 Am. Rep. 146.

7 *Story v. New York Elevated R. Co.* 90 N. Y. 122, 170; 43 Am. Rep. 146.

§ 810. Of compensation to abutting proprietors, the fee of the street being in the public.— The distinction referred to above,[1] between cases in which the fee in streets or highways is vested in the abutting property holders and those in which it has been already acquired by the public, is not extended to the appropriation of a street for the purpose of an elevated railway;[2] for a permanent structure above the surface of a street is an encroachment upon the appurtenant easement of open frontage held by abutting proprietors, which is not authorized by the original dedication or condemnation of the property to the public use;[3] and in the leading case on this subject in New York, it is held that elevated railways are inconsistent with the uses to which the streets of cities were originally condemned.[4] Accordingly, even though there be no express covenant that the street shall remain open forever,[5] and whether the abutting property owners are vested with the fee of the street or not, they are entitled to compensation for deprivation of light and air,[6] and for increased difficulty of access to their premises,[7] a fair measure of which is the depreciation in the market or rental value.[8] It has been said, however, that where a person continues

to use his property for his business in the same manner as before the erection of the structure, he cannot in an action for damages against the company recover the depreciation of the rental value.[9] But in another case it was decided, in determining the damages sustained by a banking-house from the erection of an elevated railway station, that it was admissible to receive evidence of the depreciation in value of that part of the building used for banking purposes, and inadmissible to show that no damage would be sustained by reason of the station-house if the property holders should carry up their buildings as high above it as they might.[10] It is proper to consider the general effect upon the business interests of the street.[11] But it has been said that noise, smoke, vibration, ashes, dust, or the ungainly appearance of the elevated structure, are not elements of damage;[12] although in other cases it has been held that when an abutting owner pays under compulsion of law a sum especially awarded as his individual contribution to the well-being and improved utility of the street to the public and to himself as abutting owner, a contract must be implied that he shall be secure in his rights to use and enjoy the street, with all the improvements and advan ages to the creation of which he has especially contributed, and accordingly he is entitled to damages for injuries arising by the operation of an elevated railroad in the street, causing smoke, gas, steam, cinders, etc., to enter his premises.[13]

1 *Supra*, § 802.

2 Lahr v. Metropolitan Elevated R'y Co. 104 N. Y. 268; In re Gilbert Elevated R'y Co. 38 Hun, 438; Falker v. New York etc. R'y Co. 17 Abb. N. C. 279; Elevated R. Co. v. Schurmeier, 7 Wall. 272, 273; Transportation Co. v. Chicago, 99 U. S. 635, 641; *Story v. New York Elevated R. Co.* 90 N. Y. 122; 43 Am. Rep. 146. *Contra*, Abendroth v. Manhattan R'y Co. 52 N. Y.

Super. Ct. 274; New York Bank v. New York Elevated R. Co. 24 Fed. Rep. 114; Currier v. Elevated R. Co. 6 Blatchf. 487; Mills on Eminent Domain, § 203.

3 Mr. Evarts' Brief for Appellant in Story v. New York Elevated R. Co. 90 N. Y. 122, 123; 43 Am. Rep. 146; citing People v. Kerr, 27 N. Y. 183, and Craig v. Rochester R. R. Co. 39 N. Y. 404.

4 *Story v. New York Elevated R. Co.* 90 N. Y. 122; 43 Am. Rep. 146.

5 *Story v. New York Elevated R. Co.* 90 N. Y. 122; 43 Am. Rep. 146; Peyser v. Metropolitan Elevated R'y Co. 12 Daly, 70; 13 Daly, 122.

6 In re Gilbert Elevated R'y Co. 38 Hun, 438; In re New York Elevated R. Co. 36 Hun, 427; Peyser v. Metropolitan Elevated R'y Co. 12 Daly, 70.

7 In re Gilbert Elevated R'y Co. 38 Hun, 438; Peyser v. Metropolitan Elevated R'y Co. 12 Daly, 70.

8 In re Gilbert Elevated R'y Co. 38 Hun, 438; Drucke v. Manhattan R'y Co. 51 N. Y. Super. Ct. 429. *Cf.* The New York "Rapid Transit Act," N. Y. Laws of 1875, ch. 606, § 6.

9 Seventh Ward Bank v. New York Elevated R. Co. 53 N. Y. Super. Ct. 412.

10 New York Bank v. New York Elevated R. Co. 28 Fed. Rep. 231.

11 Drucke v. Manhattan R'y Co. 51 N. Y. Super. Ct. 429.

12 In re New York Elevated R. R. Co. 36 Hun, 427.

13 Abendroth v. Manhattan R'y Co. 19 Abb. N. C. 248, reversing S. C. 52 N. Y. Super. Ct. 274. *Cf.* Peyser v. Metropolitan Elevated R'y Co. 13 Daly, 122.

§ 811. Of compensation to abutting proprietors, the fee of the street not being in the public. But there is no conflict of authority with respect to the obligation of the railway company to make compensation for the taking of streets and highways when the fee thereto is not vested in the public,[1] the new and additional burden thereby imposed being such a taking of private property as cannot be authorized by the legislature without compensation;[2] and it is immaterial, so far as compensation and damages are concerned, whether the fee be vested in the abutting property-holder or in his grantor. The former may recover in either case.[3] So where a canal is taken by a railway, the fee-holder may recover for the additional burden thereby imposed.[4] It is not proper to make any deduction from the compensation on account of a

part of the land condemned for a railway having been subsequently laid out and used as a public highway.[5]

1 Fanning v. Osborne, 34 Hun, 121, and cases cited *infra*, and *supra* § 802.

2 *Schurmeier v. St. Paul etc. R. R. Co.* 7 Wall. 272; S. C. 10 Minn. 82; 88 Am. Dec. 59; Mahan v. New York Central R. R. Co. 24 N. Y. 658; Carpenter v. Oswego etc. R. R. Co. 24 N. Y. 655; Wager v. Troy etc. R. R. Co. 25 N. Y. 526; *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 9; 31 Am. Dec. 313 (annotated); Trustees of Presbyterian Soc. v. Auburn etc. R. R. Co. 3 Hill 539; Fletcher v. Auburn etc. R. R. Co. 25 Wend. 464; Craig v. Rochester City R. R. Co. 39 N. Y. 404; People v. Law, 22 How. Pr. 117; *Davis v. Mayor of N. Y.* 14 N. Y. 521; 67 Am. Dec. 186; *Williams v. New York Central R. R. Co.* 16 N. Y. 97; 69 Am. Dec. 651; Washington Cemetery v. Prospect Park etc. R. R. Co. 7 Hun, 750; Henderson v. New York Central R. R. Co. 78 N. Y. 423; Bissell v. New York Central R. R. Co. 23 N. Y. 61; *Harrison v. New Orleans etc. R'y Co.* 34 La. An. 462; 44 Am. Rep. 438; *Eichels v. Evansville R'y Co.* 78 Ind. 261; 41 Am. Rep. 561; *Citizens' Coach Co. v. Camden R. R. Co.* 33 N. J. Eq. 267; 36 Am. Rep. 542; Spencer v. Point Pleasant R. R. Co. 23 W. Va. 406; Mills on Eminent Domain § 204; Werger v. St. Louis etc. R. R. Co. 35 La. An. 641; *Jones v. Keith*, 31 Texas, 394; 14 Am. Rep. 382; *Burlington etc. R. R. Co. v. Reinhackle*, 15 Neb. 279; 48 Am. Rep. 342; Hatch v. Cincinnati etc. R. R. Co. 18 Ohio St. 547; Starr v. Camden etc. R. R. Co. 24 N. J. 542; Jersey City etc. R. R. Co. v. Jersey City etc. R. R. Co. 20 N. J. Eq. 61; Morris & Essex R. R. Co. v. Hudson Tunnel R. R. Co. 25 N. J. Eq. 384; Blisch v. Chicago etc. R. R. Co. 43 Wis. 183; Cape Girardeau etc. R. R. Co. v. Renfroe, 58 Mo. 265; State v. Laverack, 35 N. J. 201; *Jones v. Keith*, 37 Texas, 394, 399; 14 Am. Rep. 382; South Carolina R. R. Co. v. Steiner, 44 Ga. 546; Talbot v. Richmond etc. R. R. Co. 31 Gratt. 642; Winona etc. R. R. Co. v. Denman, 10 Minn. 267; Harrington Grey v. First Div. St. Paul etc. R. R. Co. 17 Minn. 215; Adams v. Hastings etc. R. R. Co. 18 Minn. 260; Kaiser v. St. Paul etc. R. R. Co. 22 Minn. 149; Brisbane v. St. Paul etc. R. R. Co. 23 Minn. 114; *Carli v. Stillwater St. R. R. Co.* 23 Minn. 373; 41 Am. Rep. 200; Terre Haute etc. R. R. Co. v. Scott, 74 Ind. 29; *Imlay v. Union Branch R. R. Co.* 26 Conn. 259; 68 Am. Dec. 392; *Nicholson v. New York etc. R. R. Co.* 22 Conn. 74; 56 Am. Dec. 390; Hinchman v. Paterson Horse R. R. Co. 17 N. J. Eq. 75, overruling Morris etc. R. R. Co. v. Newark, 10 N. Y. Eq. 352; Street R. R. Co. v. Cumminsville, 14 Ohio St. 547; Louisville etc. R. R. Co. v. Cox, 48 Ind. 178; Lafayette etc. R. R. Co. v. Murdock, 68 Ind. 137, Cox v. Louisville etc. R. R. Co. 48 Ind. 178; Cooley's Constitutional Limitations, 549; Pacific R. R. Co. v. Leavenworth, 1 Dill. 393, note; Grand Rapids R. R. Co. v. Heisel, 47 Mich. 393; Sherman v. Milwaukee R. R. Co. 40 Wis. 645; *Ford v. Chicago R. R. Co.* 14 Wis. 609; 80 Am. Dec. 79.; Kaiser v. St. Paul R. R. Co. 22 Minn. 149; South. Pacific R. R. Co. v. Reed, 41 Cal. 256; Denver v. Bayer, 7 Colo. 113; Kucheman v. Chicago etc. R. R. Co. 45 Iowa, 366; Buchner v. Chicago R'y Co. 60 Wis. 264; Hastings etc. R. R. Co. v. Ingalls, 15 Neb. 123; Gotschalk v. Chicago etc. R. R. Co. 14 Neb. 550. *Cf.* Lexington etc. R. R. Co. v. Applegate, 8 Dana (Ky.) 289; 33 Am. Dec. 497.

3 Fanning v. Osborne, 34 Hun, 121. *Cf.* Upham v. Worcester 113 Mass. 97.

4 Pittsburgh etc. R. R. Co. v. Bruce (Pa. 1883), 10 Am. & Eng R. R. Cas. 1; Commonwealth v. Northeast R. R. Co. 27 Pa. St. 339; Jessup v. Loucks, 55 Pa. St. 350; Lafayette etc. R. R. Co. v. Murdock, 68 Ind. 137; Goodwin v. Cincinnati etc. R. R. Co. 28 Ohio St. 643.

5 New York etc. R. R. Co. v. Stanley, 39 N. J. Eq. 361.

§ 812. Of damages for wrongful taking of streets.—When an elevated railway company has erected its structure and operated its road without having first condemned the fee or easement of the street, it becomes liable for the maintenance of a nuisance, and an injunction may be had against it, to take effect after a reasonable time for settlement of damages with the abutting property owners.[1]

1 Glover v. Manhattan R'y Co. 51 N. Y. Super. Ct. 1; *Story v. New York Elevated R. Co.* 90 N. Y. 122, 178, 179; 43 Am. Rep. 146. In this, the leading case on the subject of elevated railways, the conclusions as summarized by the court were: First, that the plaintiff, by force of the grant of the city, made to his grantors, has a right or privilege in Front street, which entitles him to have the same kept open and continued as a public street for the benefit of his abutting property: Second, that this right or privilege constitutes an easement in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property within the meaning of the constitution, of which he cannot be deprived without compensation: Third, that such structure as the court found the defendant was about to erect in Front street, and which it has since erected, is inconsistent with the use of Front street as a public street: Fourth, that the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor: Fifth, that the defendant's acts are unlawful, and as the structure is permanent in its character—and, if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff—he has the right to restrain the erection and continuance of the road by injunction: Sixth, that the statutes under which the defendant is organized authorize it to acquire such property as may be necessary for its construction and operation by the exercise of the right of eminent domain: Seventh, the injunction prohibiting the continuance of the road in Front street should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same: *Story v. New York Elevated R. Co.* 90 N. Y. 122, 178, 179; 43 Am. Rep. 146.

CHAPTER XXXI.

OF THE MEASURE OF COMPENSATION AND OF DAMAGES.

§ 813. The measure of compensation for lands appropriated.
§ 814. Of compensation for the condemnation of buildings.
§ 815. Peculiar adaptability or prospective use as affecting market value.
§ 816. The same subject continued.
§ 817. Enhanced value from construction of road.
§ 818. The measure of damages to the unappropriated residue.
§ 819. Of single and disconnected properties.
§ 820. The risk of fire.
§ 821. Of fences and farm crossings.
§ 822. Of obstructing drainage and of flooding.
§ 823. Of injuries to riparian rights.
§ 824. The award presumed to cover incidental injuries.
§ 825. Of consequential injuries.
§ 826. Of speculative damages.
§ 827. Of resulting benefits.
§ 828. Compensation to be made in "money" in some States.
§ 829. Of interest upon the award.
§ 830. Wrongful entry—Ejectment—Trespass.
§ 831 Of the measure of damages in an action for trespass.

§ 813. The measure of compensation for lands appropriated.—For such land as is actually taken by a railway for the construction of its road, the owner is entitled to compensation to the *full*[1] amount of its cash market value,[2] at the time of the appropriation,[3] with due reference to the uses to which it is ordinarily best adapted,[4] or to which, by reason of peculiar circumstances, it may be most suited;[5] that is, the price for which a prudent man

would sell it,[6] after having reasonably ample time to dispose of it.[7] The owner cannot be compelled to accept the amount at which it is assessed for taxation,[8] nor the price which it would probably bring at a forced sale;[9] nor is the value to be determined by the price paid therefor by the owner.[10] Market value is, ordinarily, to be proven by the opinion of witnesses, and in support of their estimates they may describe property, giving its location, advantages and surroundings.[11]

1 Virginia etc. R. R. Co. v. Henry, 8 Nev. 165.

2 Springfield etc. R'y Co v. Rhea, 44 Ark. 258; *Brown v. Beatty*, 34 Miss. 227; 69 Am. Dec. 389; Chapman v. Oshkosh etc. R. R. Co. 33 Wis. 629; Low v. Railroad Co. 63 N. H. 557.

3 Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381; Wilson v. Rockford etc. R. R. Co. 59 Ill. 273. Its value prior to the time the road was projected is not admissible in evidence: Texas etc. R'y Co. v. Cella, 42 Ark. 528. The inquiry as to value must be limited strictly to the time of taking: Morin v. Minneapolis etc. R'y Co. 30 Minn. 100; *Stafford v. City of Providence*, 10 R. I. 567; 14 Am. Rep. 710; Sweaney v. United States, 62 Wis. 316; Logansport etc. R'y Co. v. Buchanan, 52 Ind. 163; Tidewater Canal Co. v. Archer, 9 Gill & J. 479; *Parks v. City of Boston*, 15 Pick. 198, 10 Am. Dec. 322; Burt v. Wigglesworth, 117 Mass. 302; Squire v. City of Somerville, 120 Mass. 579; Carli v. Stillwater etc. R. R. Co. 16 Minn. 260; Jones v. New Orleans etc. R. R. Co. 70 Ala. 227; Texas etc. R'y Co. v. Cella, 42 Ark. 528; Young v. Harrison, 17 Ga. 30; Selma etc. R. R. Co. v. Keith, 53 Ga. 178; Cook v. South Park Comm'rs, 61 Ill. 115; Dupuis v. Chicago etc. R'y Co. 115 Ill. 97; Indiana Central R. R. Co. v. Hunter, 8 Ind. 74. The compensation is to be estimated as of the time of the award, even though the land has been already improperly taken by the company: Blue Earth Co. v. St. Paul etc. R. R. Co. 28 Minn. 503; 10 Am. & Eng. R. R. Cas. 203. *Cf.* Morin v. St. Paul etc. R. R. Co. 30 Minn. 100.

4 King v. Minneapolis Union R'y Co. 32 Minn. 224; and cases cited *infra*, § 815.

5 Johnson v. Freeport etc. R'y Co. 111 Ill. 413; Dupuis v. Chicago etc. R'y Co. 115 Ill. 97; and cases cited *infra*, § 815. Where land possesses no market value, and an important factor in determining its value is the use to which it is to be applied, it is erroneous to give the jury a mere naked instruction that compensation should be measured by market value: Chicago etc. R'y Co v. Chicago etc. R. R. Co. 112 Ill. 589.

6 Mills on Eminent Domain, § 168.

7 Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381.

8 New Orleans Pacific R'y Co. v. Murrell, 36 La. An. 344; Bowen v. Providence etc. R. R. Co. 5 Gray, 35; Virginia etc. R. R. Co. v. Henry, 8 Nev. 165; Springfield etc. R'y Co. v. Rhea, 44 Ark. 358. Nor is its assessed value admissible in evidence to influence the appraisement: Texas etc. R'y Co. v. Eddy, 49 Ark. 527.

9 Everett v. Union Pacific R. R. Co. 59 Iowa, 243.

10 St. Louis etc. R'y Co. v. Smith, 42 Ark. 265; Cincinnati etc. R. R.

Co. v. Mims, 71 Ga. 240; Jacksonville etc. R. R. Co. v. Walsh, 106 Ill. 253; Robb v. Maysville etc. Co. 3 Met. (Ky.) 117; Lawrence v. Boston, 119 Mass. 126; Somerville etc. R. R. Co. v. Doughty, 22 N. J. 495; Memphis v. Bolton, 9 Heisk. 508.

11 Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381; S. C. 33 Am. & Eng. R. R. Cas. 169.

§ 814. Of compensation for the condemnation of buildings.—Unless prohibited by its charter, or by some general law of the State, a railway company may condemn dwelling-houses and other buildings, as well as lands, the right to appropriate the former being an incident to its power to condemn the latter.[1] But the owner must be paid in full for the building, as well as for the land.[2] And the jury may take into consideration the inconvenience and loss resulting to the owner from being deprived of his home and established place of business.[3] When, however, the owner of land taken with a building upon it has received compensation for both land and building, he cannot afterwards sue the company for the value of the building.[4] When the railway company is forbidden to appropriate dwelling-houses, occupied by the owners, without their consent, the prohibition is held to extend not only to a dwelling-house itself, but also to such curtilage as is necessary for its reasonable enjoyment as a residence by the owner and his family.[5] And where a railroad company, authorized by its charter to condemn a certain number of feet for a right of way, so long as it should not disturb any building, constructed its road through a piece of land without instituting proceedings for condemnation, and the owner of the land erected a house near the track and maintained it for a number of years, the company was held

barred from its privilege of condemning the land on which the house stood.[6]

1 Forney v. Fremont etc. R. R. Co. 23 Neb. 465; S. C. 33 Am. & Eng. R. R. Cas. 162; Brackett v. Ohio etc. R. R. Co. 14 Pa. St. 241. Wells v. Somerset etc. R. R. Co. 47 Me. 345; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84.

2 Forney v. Fremont etc. R. R. Co. 23 Neb. 465; S. C. 33 Am. & Eng. R. R. Cas. 162.

3 Covington etc. R. R. Co. v. Piel, 87 Ky. 267; S. C. 33 Am. & Eng. R. R. Cas. 207.

4 Forney v. Fremont etc. R. R. Co. 23 Neb. 465; S. C. 33 Am. & Eng. R. R. Cas. 162.

5 Swift and Given's Appeal, 111 Pa St. 516, construing Pa. Act of Feb. 19, 1849, Pa. Laws. 83.

6 Alabama etc. R. R. Co. v. Gilbert, 71 Ga. 591.

§ 815. Peculiar adaptability or prospective use as affecting market value.—When land is taken under the power of eminent domain, the award should not be limited to its value for cultivation or habitation.[1] It is proper to consider its adaptability to any peculiar use to which it may have been applied or its prospective value with reference to any use to which it might otherwise be peculiarly suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.[2] Thus, evidence to show that land required for a railroad bridge possesses especial advantages as a bridge site, is admissible as affecting the question of market value.[3] So, where sending logs down a river is a regular business, the adaptability of islands in the river in connection with the opposite bank of the river to form a boom of large dimensions and for holding logs in safety, is a proper element for consideration in estimating the value of lands on the islands when appropriated for a public use.[4] And in determining the amount of the award, it has

been held proper to take into consideration the peculiar or prospective adaptation of the land for a ferry landing,[5] or for coal mines,[6] or for handling and storing coal,[7] or for suburban residences,[8] or for warehouses, grain elevators or manufacturing purpcses.[9] So, also, the fact that land was used as a training track, and that its availability for that purpose will be destroyed, may be considered.[10] But the value of unopened mines cannot be considered,[11] nor the prospective value of land as laid out in city lots,[12] and the possible or probable profits of the owner that might result from his enjoyment of the property cannot be considered.[13] Neither should it be considered an element of damage, that the building of the railway will prevent the dredging of a canal, whereby the land would be improved, it appearing that a connection with an extension would have to be effected in order to make the canal, and that its construction in any event is doubtful and contingent.[14]

1 Littlerock etc. R'y Co. v. McGehee, 14 Ark. 202; Harrison v. Young, 9 Ga. 359; and cases cited in the following note.

2 *Boom Co. v. Patterson*, 98 U. S. 403, 407; Calumet River R. R. Co. v. Moore, 124 Ill. 329; S. C. 13 Am. & Eng. R. R. Cas. 179; McClean v. Chicago etc. R'y Co. 67 Iowa, 568; Sherman v. St. Paul etc. R. R. Co. 30 Minn. 227; Chicago etc. R. R. Co. v. Jacobs, 110 Ill. 414; Russell v. St. Paul etc. R'y Co. 33 Minn. 210; Missouri Bridge Co. v. Ring, 58 Mo. 491; Amoskeag Manuf. Co. v. Worcester, 60 N. H. 522; Somerville etc. R. R. Co. v. Doughty, 22 N. J. 495; Trustees of College Point v. Dennett, 5 Thomp. & C. 217; *Goodin v. Cincinnati etc. Co.* 18 Ohio St. 169; 98 Am. Dec. 95; Chicago etc. R'y Co. v. Chicago etc. R. R. Co. 112 Ill. 539; Dupuis v. Chicago etc. R'y Co. 115 Ill. 97; Chicago etc. R. R. Co. v. Blake, 116 Ill. 163; Robb v. Maysville etc. Co. 3 Met. (Ky.) 117; Boston etc. R. R. Co. v. Old Colony R. R. Co. 12 Cush. 605; King v. Minneapolis etc. R'y Co. 32 Minn. 224; Cincinnati etc. R'y Co. v. Longworth, 30 Ohio St. 108; Shenango etc. R. R. Co. v. Braham, 79 Pa. St. 447; Little Rock etc. R'y v. McGehee, 41 Ark. 202; Harrison v. Young, 9 Ga. 359; Young v. Harrison, 17 Ga. 30; Johnson v. Freeport etc. R'y Co. 111 Ill. 413; Mills on Eminent Domain, § 173.

3 Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381.

4 *Boom Co. v. Patterson*, 98 U. S. 403.

5 Little Rock etc. R'y Co. v. McGehee, 41 Ark. 202; although the owner had not yet established any ferry at that place

6 Doud v. Mason City etc. R. R. Co. 76 Iowa, 438.

7 Chicago etc. R'y Co. v. Ward (1889), — Ill. —.
8 Haines v. St. Louis etc. R'y Co. 65 Iowa, 216.
9 Russell v. St. Paul etc. R'y Co. 33 Minn. 210.
10 St. Louis etc. R. R. Co. v. Kirby, 104 Ill. 345.
11 Searle v Lackawanna etc. R. R. Co. 33 Pa. St. 57.
12 Everett v. Union Pacific R. R. Co. 59 Iowa, 243.
13 Tide Water Canal Co. v. Archer, 9 Gill & J. 479; Eddings v. Seabrook, 12 Rich. 504.
14 Munkwitz v. Chicago etc. R'y Co. 64 Wis. 403.

§ 816. **The same subject, continued.**—Any improvements which have been made upon property with reference to the use to which it is peculiarly adapted may be considered as enhancing its value.[1] By way of proving the value of land for some especial use, plans of structures which the owner had intended to erect thereon may be admitted in evidence.[2] And a plat of the land which the owner had previously made, with a view to selling it off in town lots, may be admitted.[3] But evidence of plans for the improvement of land adopted prior to the location of the road and afterwards abandoned, cannot be admitted in evidence.[4]

1 King v. Minneapolis Union R'y Co. 32 Minn. 224.
2 Chicago etc. R. R. Co. v. Blake, 116 Ill. 163; Calumet River R. R. Co. v. Moore, 124 Ill. 329; 33 Am. & Eng. R. R. Cas. 179.
3 Cincinnati etc. R'y Co. v. Longworth, 30 Ohio St. 108. *Contra*, Everett v. Union Pacific R. R. Co. 59 Iowa, 243.
4 Scott v. Indianapolis etc. R. R. Co. (1883) — Ind. —; S. C. 10 Am. & Eng. R. R. Cas. 189.

§ 817. **Enhanced value from construction of road.**—Work already done by a railroad company upon the land cannot be regarded as a part of the realty for the purpose of assessing the damages.[1] Thus if a railroad company, under proceedings for condemnation, enters on the land under an order of the county judge, and constructs its road across a tract of land in such a manner that it is embed-

ded in the soil and becomes a part of the realty, and if the proceedings are dismissed and new proceedings for the condemnation of the land are commenced, the owner is not entitled to have the value of the ties and iron constituting the track included in his damages upon the final condemnation.[2] And the same principle applies where the company has entered under color of title derived from a party in possession, and has made improvements upon the land.[3] But where possession of land is wrongfully taken before condemnation, and improvements thereon are made which become a part of the realty, it seems that the owner of the land will be entitled to have the enhanced value taken into account in assessing for damages.[4] And where one railway company appropriates a grade, which another company had previously made and abandoned, the land-owner is entitled to the value of the land taken as enhanced by the grading.[5]

1 Morgan's Appeal, 39 Mich. 675; California etc. R. R. Co. v. Armstrong, 46 Cal. 85.

2 California etc. R. R. Co. v. Armstrong, 46 Cal. 85.

3 *Cohen v. St. Louis etc. R. R. Co.* 34 Kan. 158; 55 Am. Rep. 242.

4 United States v. Lands in Monterey Co. 47 Cal. 515; *Graham v. Commersville etc. R. R. Co.* 36 Ind. 463; 10 Am. Rep. 56; *Cohen v. St. Louis etc. R. R. Co.* 34 Kan. 158; 55 Am. Rep. 242; Hunt v. Missouri etc. R'y Co. 76 Mo. 115.

5 *Cohen v. St. Louis etc. R. R. Co.* 34 Kan. 158; 55 Am. Rep. 242. See, also, note to *Winona etc. R. R. Co. v. Waldron*, 83 Am. Dec. 100, 113; S. C. 11 Minn. 515

§ 818. The measure of damages to the unappropriated residue.—Where part only of the owner's land is taken, the injury to the part not taken is a proper element of damage, as well as the value of the part actually appropriated,[1] whether the injury consist in impairing the owner's enjoyment and safety in the use of the residue,[2] or in dimin-

ishing its rental value,[3] or in rendering it less salable than before.[4] Damages incident to the taking of land, independent of the part actually taken, are dependent upon the particular circumstances of each case, and no general rule can be stated which may not be open to exceptions.[5] In determining the damages to the part not taken, however, all facts and circumstances which have the effect of depreciating its value, and which are the direct and necessary result of the taking, may be considered;[6] as, for example, the cutting and filling of land, the making of embankments and excavations,[7] injuries to crops,[8] the risk from fire,[9] obstruction to ingress and egress by embankments and ditches,[10] or by trains of cars allowed to stand upon the company's track;[11] the necessity for precautions to protect the owner's family and his live stock from accident,[12] the inconvenience of having lands temporarily thrown open,[13] the smoke, dust and noise of trains,[14] damages likely to result from necessary and properly executed blasting;[15] the fact that building and operating the railroad will interfere with the business of a mill, by making it unsafe to drive horses near it, and dangerous and inconvenient for persons going to and from it;[16] the fact that the land or property is rendered less suitable for the uses to which it would otherwise be best adapted.[17] All such elements of damage should be included in the original award, for there can be no subsequent recovery for merely incidental injuries after the land has once been appropriated by condemnation proceedings.[18] But mere inconveniences to the owners of the lands appropriated, suffered by them

in common with the rest of the community, are not proper elements of damage.[19]

1 Springfield etc. R'y v. Rhea, 44 Ark. 258; Tonica etc. R. R. Co. v. Undersicker, 22 Ill. 221; St. Louis etc. R. R. Co. v. Cappa, 67 Ill. 607; Keithsburg etc. R. R. Co. v. Henry, 79 Ill. 290; Wilmes v. Minneapolis etc. R. R. Co. 29 Minn. 242; Lake Shore etc. R'y Co. v. Chicago etc. R. R. Co. 100 Ill. 21; Chicago etc. R'y Co. v. Smith, 111 Ill. 353; Richmond etc. Road Co. v. Rogers, 1 Duvall, 135; Vicksburg etc. R. R. Co. v. Dillard, 35 La. An. 1045; Bangor etc. R. R. Co. v. McComb, 60 Me. 290; Presbrey v. Old Colony etc. R'y Co. 103 Mass. 1; *Walker v. Old Colony etc. R'y Co.* 103 Mass. 10; 4 Am. Rep. 509; Johnson v. City of Boston, 130 Mass. 452; Edmunds v. City of Boston, 108 Mass. 535; *Brown v. Beatty*, 34 Miss. 227; 69 Am. Dec. 389; Dearborn v. Boston etc. R. R. Co. 24 N. H. 179; Virginia etc. R. R. Co. v. Henry, 8 Nev. 175; Raleigh etc. R. R. Co. v. Wicker, 74 N. C. 220; Snyder v. Western Union R. R. Co. 25 Wis 60; Bigelow v. Western Wis. R'y Co. 27 Wis. 478; Chapman v. Oshkosh etc. R. R. Co. 33 Wis. 629; Washburn v. Milwaukee etc. R. R. Co. 59 Wis. 364. For an exhaustive review of authorities, see note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 100, 113–121.

2 Little Rock etc. R'y Co. v. Allen, 41 Ark. 431, where the necessity for precautions for the safety of the owner's family and cattle was held an element of damage; Leavenworth etc. R. R. Co. v. Paul, 28 Kan. 816, where the cost of fencing was allowed; Cummins v. Des Moines etc. R'y Co. 63 Iowa, 397; where the proximity of a depot and the number of tracks were considered.

3 Pittsburgh etc. R. R. Co. v. Rose, 74 Pa. St. 362; Chicago etc. R. R. Co. v. Dresel, 110 Ill. 89.

4 Setzler v. Pennsylvania etc. R. R. Co. 112 Pa. 56; S. C. 24 Am. & Eng. R. R. Cas. 280; *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100.

5 Fremont etc. R. R. Co. v. Lamb, 11 Neb. 592; S. C. 5 Am. & Eng. R. R. Cas. 367.

6 St. Louis etc. R. R. v. Anderson, 39 Ark. 167; Springfield etc. R'y v. Rhea, 44 Ark. 258; Rockford etc. R. R. Co. v. McKinley, 64 Ill. 338; St. Louis etc. R'y Co. v. Teters, 68 Ill. 144; McReynolds v. Burlington etc. R'y Co. 106 Ill. 152; De Buol v. Freeport etc. R'y Co. 111 Ill. 493; Montmorency G. R. Co. v. Stockton, 43 Ind. 323; Baltimore etc. R. R. Co. v. Lansing, 52 Ind. 229; Harrison v. Iowa etc. R. R. Co. 36 Iowa, 323; Vicksburg etc. R. R. Co. v. Dillard, 35 La. An. 1045; Bangor etc. R. R. Co. v. McComb, 60 Me. 290; *Walker v. Old Colony etc. R'y Co.* 103 Mass. 10; 4 Am. Rep. 509; Minnesota Valley R. R. Co. v. Doran, 17 Minn. 188; Curtis v. St. Paul etc. R. R. Co. 20 Minn. 28; Missouri P. Co. v. Hays, 15 Neb. 224; Republican Valley R. R. Co. v. Linn, 15 Neb. 234; Dearborn v. Boston etc. R. R. 24 N. H. 179; Petition of Mt. Washington Road Co. 35 N. H. 134; Somerville etc. R. R. Co. v. Doughty, 22 N. J. 4.5; Cleveland & P. R. R. Co. v. Ball, 5 Ohio St. 568; Cincinnati etc. R'y Co. v. Longworth, 30 Ohio St. 108; Watson v. Pittsburgh etc. R. R. Co. 37 Pa. St. 469; *Wilmington etc. R. R. Co. v. Stauffer*, 60 Pa. St. 374; 100 Am. Dec. 574; Greenville etc. R. R. Co. v. Partlow, 5 Rich. 428; White v. Charlotte etc. R. R. Co. 6 Rich. 47; Bowen v. Atlantic etc. R. R. Co. 17 S. C. 574; International & Great Northern R. R. Co. v. Pape, 62 Tex. 313; Robbins v. Milwaukee etc. R. R. Co. 6 Wis. 636. For a monograph upon the question of "Damages in Eminent Domain Proceedings," see note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 100, 113–121; S. C. 11 Minn. 515.

7 Kansas City etc. R. R. Co. v. Story, 96 Mo. 611; Cummins v. Des Moines etc. R'y Co. 63 Iowa, 397; Little Rock etc. R'y Co. v. Allen, 41 Ark. 431; Missouri Pacific Co. v. Hays, 15 Neb. 224; Republican Valley R. R.

Co. v. Linn, 15 Neb. 234; *Wilmington etc. R. R. Co. v. Stauffer*, 60 Pa. St. 374; 100 Am. Dec. 574.

8 Lance v. Chicago etc. R. R. Co. 57 Iowa, 636. Although they be planted after the location of the road, yet, if before entry or to the execution of bonds to secure damages, the injury to them may be considered: Gilmore v. Pittsburgh etc. R. R. Co. 104 Pa. St. 275.

9 *Infra*, § 820.

10 Little Rock, etc. R'y Co. v. Allen, 41 Ark. 431; Kansas City etc. R. R. Co. v. Story, 96 Mo. 611; Hot Springs R. R. Co. v. Williamson, 45 Ark. 429, where, although an abutting land owner did not own the fee of the street, and although the structure was skillfully built, damages were allowed for the obstruction; Sherwood v. St. Paul etc. R'y Co. 21 Minn. 127, where damages were allowed for the inconvenience of hauling brick across a railway constructed through a brickyard. But see Cumberland Valley R. R. Co. v. Rhoadarmer, 107 Pa. St. 214.

11 Union Railroad etc. Yard Co. v. Moore, 80 Md. 458; S. C. 5 Am. & Eng. R. R. Cas. 346.

12 Little Rock etc R'y etc. Co. v. Allen, 41 Ark. 431.

13 St. Louis etc. R. R. Co. v. Kirby, 104 Ill. 345.

14 Little Rock etc. R'y Co. v. Allen, 41 Ark. 431; Blue Earth Co. v. St. Paul etc. R. R. Co. 28 Minn. 503; S. C. 10 Am. & Eng. R. R. Cas. 209. *Contra*, Dimmick v. Council Bluffs etc. R. R. Co. 58 Iowa, 637.

15 But not such as may possibly result from negligent blasting. It cannot be presumed that the work will be conducted negligently, and if it be so done, a separate action will lie: St. Peters v. Denison, 58 N. Y. 416; 17 Am. Rep. 258; Dodge v. County Comm'rs, 3 Met. 380; Brown v. Providence R. R. Co. 5 Gray, 35; Whitehouse v. Androscoggin R. R. Co. 52 Me. 208; Carman v. Steubenville etc. R. R. Co. 4 Ohio St. 399.

16 Western Pennsylvania R. R. Co. v. Hill, 56 Pa. St. 460.

17 Little Rock etc. R'y Co. v. Allen, 41 Ark. 431, and cases cited *supra*, § 815, and *infra*, § 819.

18 *Vide infra*, § 824.

19 Sedalia etc. R'y Co. v. Abell, 18 Mo. App. 632, and cases cited *supra*, § 806.

§ 819. Of single and disconnected properties. Where the value of land consists partly in its being a single unbroken tract, damages may be allowed for its division by the construction of a railway through it.[1] Thus, the fact that the railroad separates the wood, water and timber from the rest of the farm, is proper to be considered.[2] And when a road is run diagonally through one quarter section of land, damages may be recovered for injury to the whole tract.[3] So an injury to a subdivision, through which the road does not pass, but which constitutes

part of the same farm, should be estimated as part of the damages, though not mentioned in the petition.[4] If there is a difference in the value of the land sought to be condemned, when considered as part of the lot from which it is to be taken, and when considered as a distinct and separate property, the higher value should control.[5] But two properties having no physical connection cannot be regarded as one, unless otherwise so inseparably connected, that injury to one must necessarily and permanently injure the other.[6] And a plaintiff alleging damages to one hundred and sixty acres, can not prove damages to an entire farm of two hundred and forty acres.[7]

1 Atchison etc R. R. Co. v. Gough, 29 Kan. 94; Keithsburg etc. R. R. Co. v. Henry, 79 Ill. 290; Hartshorn v. Burlington etc. R. R. Co. 52 Iowa, 613; Ham v. Wisconsin etc. R'y Co. 61 Iowa, 716; Winkleman v. Des Moines etc. R'y Co. 62 Iowa, 11; Cummins v. Des Moines etc. R'y Co. 63 Iowa, 397; Hollingsworth v. Des Moines etc. R'y Co. 63 Iowa, 443; Haines v. St. Louis etc. R'y Co. 65 Iowa, 216; Sherwood v. St. Paul etc. R'y Co. 21 Minn. 122; Wilmes v. Minneapolis etc. R'y Co. 29 Minn. 242; Boston etc. R'y Co. v. Turnbull, 31 Hun, 461. *Cf.* Cathedral v. West Ontario etc. R. R. Co. Ontario Rep. 14 Ch. Div. 246. As to what is to be regarded as a single tract, see note to Potts v. Pennsylvania etc. R. R. Co. 125 N. J. 59; 33 Am. & Eng. R. R. Cas. 33, 184, 193.

2 Chicago etc. R. R. Co. v. Hopkins, 90 Ill. 316.

3 Kansas City etc. R. R. Co. v. Merrill, 25 Kan. 421; S. C. 2 Am. & Eng. R. R. Cas. 435.

4 Kansas City etc. R. R. Co. v. Story, 96 Mo. 611.

5 Chicago etc. R. R. Co. v. Blake, 116 Ill. 163.

6 Potts v. Pennsylvania etc. R. R. Co. 119 Pa. St. 278; 33 Am. & Eng. R. R. Cas. 184.

7 Waltemeyer v. Wisconsin etc. R. R. Co. 71 Iowa, 626.

§ 820. The risk of fire.—The danger of fire, which may be caused by the future negligence of the company, cannot be included in the award of damages, both because it cannot be presumed that he company will commit an unlawful act, and ecause, if it should be guilty of negligence, an

action in tort will lie therefor.[1] But the risk of fire which may remain, after presuming that the company will take every needful precaution, does constitute an element of damage which may be considered in the award, according to the weight of authority.[2] There are, however, cases holding that the damage resulting from the fear of fire to buildings and crops, is too remote and speculative to be taken into account.[3] And, at any rate, the danger from fire must be real, in order to constitute it an element of damage. If the buildings are some distance from the road, the danger will not be considered.[4]

1 Kansas City etc. R. R. Co. v. Kregels, 32 Kan. 608.

2 Kansas City etc. R. R. Co. v. Kregels, 32 Kan. 608; Texas etc. R'y Co. v. Cella, 42 Ark. 528; Little Rock etc. R'y Co. v. Allen, 41 Ark. 431; Keithsburg R. R. Co. v. Henry, 79 Ill. 290; Setzler v. Pennsylvania etc. R. R. Co. 112 Pa. St. 56; Bangor etc. R. R. Co. v. McComb, 60 Me. 290; Chapman v. Oshkosh etc. R. R. Co. 33 Wis. 629, where a lot used in connection with a sawmill was rendered unsafe for the storage of lumber; Pierce v. Worcester R. R. Co. 105 Mass. 199; Colville v. St. Paul etc. R. R. Co. 19 Minn. 283; Curtis v. St. Paul etc. R. R. Co. 20 Minn. 28; Stillman v. Northern Pacific etc. R. R. Co. 34 Minn. 420; *Adden v. White Mountain etc. R. R. Co.* 55 N. H. 413; 20 Am. Rep. 220; Somerville etc. R. R. Co. v Doughty, 32 N. J. 495; In re Utica R. R. Co. 56 Barb. 456; Oregon R. R Co. v. Barlow, 3 Or. 311.

3 *Rodemacher v. Milwaukee etc. R. R. Co.* 41 Iowa, 297; 20 Am. Rep. 592; Lance v. Chicago etc. R'y Co. 57 Iowa. 639; Fremont etc. R. R. Co. v. Whalen, 11 Neb. 585; Gilmore v. Pittsburgh etc. R. R. Co. 104 Pa. St. 275; Sunbury etc. R. R. Co. v. Hummell, 27 Pa. St. 99; Lehigh Valley R. R. Co. v. Lazams, 28 Pa. St. 203; *Patten v. Northern Central R'y Co.* 33 Pa. St. 426; 75 Am. Dec. 616, note 616. *Cf.* Wooster v. Sugar Valley etc. R. R. Co. 57 Wis. 311.

4 Jones v. Chicago etc. R. R. Co. 68 Ill. 380; Hatch v. Cincinnati etc. R. R. Co. 19 Ohio St. 92.

§ 821. **Of fences and farm crossings.**—Where the railroad company is not obliged to make reasonable farm crossings, the cost of making such crossings is a proper element of damage to be allowed to the owner;[1] and the expense of fencing along the line of a railroad is a proper item to be taken into account in estimating damages, unless

the company is bound to fence its road.[2] But if the company is required by law to maintain fences, an allowance cannot be made to the owner for the cost of erecting them.[3] The inconvenience, however, of having the land temporarily thrown open, and the fact that the company is not bound to fence its road until six months after its completion, is to be considered in estimating the damage to land.[4] Under the Illinois statute, the fencing of a railroad should embrace the entire right of way.[5] *Mandamus* is the proper proceeding to compel a railroad to construct fences under the statute.[6] The regulating of the construction and maintenance by railroad companies of fences and cattle-guards, at and along their railroads, is in the exercise of the police power of the State; and if in any case the legislature may bind itself not to exercise this power, an intention to do so cannot be implied, but must appear in express and unmistakable terms.[7]

1 Atchison etc. R. R. Co. v. Gough, 29 Kan. 24.

2 New York etc. R. R. Co. v. Stanley, 35 N. J. 283; 10 Am. & Eng. R. R. Cas. 345; Greenville etc. R. R. Co. v. Partlow, 5 Rich. 428; *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100; Texas etc. R'y Co. v. Cella, 42 Ark. 523; Butte County v. Boydston, 64 Cal. 110; Evansville etc. R. R. Co. v. Fitzpatrick, 10 Ind. 120; Pennsylvania etc. Co. v. Bunnell, 81 Pa. St. 414. But see California Southern R. R. Co. v. Southern Pacific R. R. Co. 67 Cal. 59.

3 *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100; Sedalia etc. R'y Co. v. Abell, 18 Mo. App. 632.

4 St. Louis etc. R. R. Co. v. Kirby, 104 Ill. 345. But see Springfield etc. R'y Co. v. Henry, 44 Ark. 390, where it is held that injuries to crops resulting from the land being thrown open, constituting a separate cause of action, cannot be included in the award.

5 Ohio etc. R. R. Co. v. People, 119 Ill. 207.

6 Ohio etc. R. R. Co. v. People, 119 Ill. 207.

7 Gillam v. Sioux City etc. R. R. Co. 26 Minn. 270.

§ 822. Of obstructing drainage and of flooding.—Injuries to land caused by obstructing its drainage and by flooding, are proper elements of

damage in determining the amount of the award.[1] Where land has been flooded, the proper measure of damages is the difference between its market value before and after the injury,[2] and evidence is not admissible as to the value of crops which might have been raised thereon but for the flooding.[3] Where, however, lands are permanently overflowed, the same damages are to be allowed as would have been given had they been taken outright.[4] But when an award has once been made, the company will not be further liable to the landowner for an injury resulting from an overflow, if its embankments have been constructed properly and with due reference to natural streams. For such damages are presumed to have been included in the original assessment in the proceedings for condemnation. And the case is not altered by any changes which the company may subsequently make, that are reasonable and proper, such as replacing a solid embankment with a trestle.[5]

1 Bentonville R. R. Co. v. Baker, 45 Ark. 252; Springfield etc. R'y Co. v. Rhea, 44 Ark. 258; Springfield etc. R'y Co. v. Henry, 44 Ark. 360; Chicago etc. R. R. Co. v. Carey, 90 Ill. 514; Vicksburg etc. R. R. Co. v. Dillard, 35 La. An. 1045; *Walker v. Old Colony R'y Co.* 103 Mass. 10; 4 Am. Rep. 509; Pflegar v. Hastings etc. R'y Co. 23 Minn. 50. *Cf.* Ryan v. Mississippi Valley etc. R. R. Co. 62 Miss. 162, where a railroad company by actual adverse possession acquired title to land situated between two ditches, and it was held liable to damages resulting from its cutting away the outer banks of the ditches.

2 Bentonville R. R. Co. v. Baker, 45 Ark. 252; *Drake v. Chicago etc. R'y Co.* 63 Iowa, 302; 50 Am. Rep. 746.

3 *Drake v. Chicago etc. R'y Co.* 63 Iowa, 302; 50 Am. Rep. 746.

4 Sweeney v. United States, 62 Wis. 396.

5 Moss v. St. Louis etc. R'y Co. 85 Mo. 86.

§ 823. Of injuries to riparian rights.—There is no private property in lands between high and low tide, or high and low water-mark on navigable rivers.[1] But the owners of lands fronting on a

navigable river are entitled to damages for injury to their riparian rights by a bridge and embankment constructed by a railroad company.[2] If the railroad takes part of a lot of flats, and thereby cuts off access to tide-water from the remaining portion, the value of such access is an element of damage.[3] And although the company be authorized by law to construct its road across a stream, it is liable for damage done to lands adjacent thereto by the construction of a bridge which causes the water and ice to gorge and overflow such land; and in choosing the character of the bridge to be built, due regard must be had to the rights of the adjacent land-owners, as well as to the safety of the public.[4] Although the company may not have constructed the bridge, but has merely succeeded to the rights and property of another company, it may be compelled to restore to the original channel waters of a stream diverted by the latter for purposes of construction.[5] The destruction of a valuable spring is properly considered in estimating the damages to land, a part of which is taken for a railroad.[6] The measure of damages in the case of the obstruction of a mill-race is the difference between the value of the mill-site and machinery before the obstruction and afterwards.[7]

1 *Lansing v. Smith*, 4 Wend. 9; 21 Am. Dec. 89; Champlain etc. R. R Co. v. Valentine, 19 Barb. 484; Davidson v. Boston etc. R. R. Co. 3 Cush. 91; Gould v. Hudson River R. R. Co. 6 N. Y. 522; *Tomlin v. Dubuque R. R. Co.* 32 Iowa, 106; 7 Am. Rep. 176; *Stevens v. Paterson etc. R. R. Co* 34 N. J. 532; S. C. 2) N. J. Eq. 126; 3 Am. Rep. 269; Thayer v. New Bedford R. R. Co. 125 Mass. 253; Harvard College v. Stearns, 15 Gray, 1; Fitchburg R. R. Co. v. Boston etc. R. R. Co. 3 Cush. 58; Davidson v. Boston etc. R. R. Co. 3 Cush. 91; Boston etc. R. R. Co. v. Old Colony R. R. Co. 12 Cush. 635; Pennsylvania R. R. Co. v. New York etc. R. R. Co. 23 N. J. Eq. 157; Attorney-General v. Hudson Tunnel Co. 27 N J. Eq. 176; Commonwealth v. Fisher, 1 Penrose & W. (Pa.) 462; Clarke v. Birmingham etc Bridge Co. 41 Pa. St. 147; *Cameron Furnace Co v. Pennsylvania Canal Co.* 2 Pearson (Pa.), 208; 84 Am. Dec. 527; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112; 84 Am. Dec. 527; *Philadelphia v. Scott*, 81 Pa. St. 80; 22 Am. Rep. 738; McKeen v. Delaware Division Canal Co. 49 Pa. St. 424; Austin v. Rutland R. R. Co. 45 Vt. 215; *Bailey v. Philadelphia etc. R. R. Co.* 4 Harr. (Del.) 389;

44 Am. Dec. 593; Rogers v. Kennebec R. R. Co. 35 Me. 319. *Cf.* In re New York Central R. R. Co. 77 N. Y. 248.

2 Chapman v. Oshkosh etc. R. R. Co. 33 Wis. 629. As to compensation for the disturbance of riparian rights, see Garwood v. New York etc. R. R. Co 83 N. Y. 400; 2 Am. & Eng. R. R. Cas. 490; 38 Am. Rep. 452.

3 Drury v. Midland R. R. Co. 127 Mass. 571.

4 McClenaghan v. Omaha etc. R. R. Co. (1889) 25 Neb. 523. The value of property appropriated by a railway company for abutments for a bridge, should be referred to the needs of the community for a bridge at that time, or soon thereafter: Shenandoah Valley etc. R. R. Co. v. Shepherd, 26 W. Va. 672. Evidence that the land required for a railway bridge possessed especial advantages as a bridge site, has been admitted as affecting the question of market value: Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381.

5 Lefurgy v. New York etc. R. R. Co. 50 Hun, 606.

6 Winkleman v. Des Moines etc. R'y Co. 62 Iowa, 11.

7 Hot Springs R. R. Co. v. Tyler, 36 Ark. 205; S. C. 10 Am. & Eng. R. R. Cas. 145.

§ 824. The award presumed to cover incidental injuries.—The acquisition of land for a railway, warrants its use for any purpose authorized by the charter of the company.[1] Thus, land taken for depot and station purposes may be used for a railway hotel, waiting-room for passengers, and ticket office; and other portions of the property may be used for the erection of a stable and a piggery and an engine-house, without making the company further liable for damages.[2] And when a land-owner has granted a right of way,[3] or the land has been condemned, it will be presumed that the contract or the award included all injuries, present and prospective, certain and contingent, which may fairly result from the use of the land by the company,[4] except such as arise from a negligent or improper exercise of the powers conferred, or from acts in excess thereof.[5] Thus, unless there appears to have been negligence, bad management, or a want of skill, in the construction of a railway embankment over property through which no natural channel passes, any injury, resulting from an overflow, or from water

standing upon the land, will be regarded as a natural consequence of the condemnation, and as covered by the original assessment of damages.[6] Damages occasioned by negligence are to be recovered in separate proceedings.[7]

1 Peirce v. Boston etc. R. R. Co. 141 Mass. 481; S. C. 24 Am. & Eng. R. R. Cas. 634.

2 Peirce v. Boston etc. R. R. Co. 141 Mass. 481.

3 North & West Branch R'y Co. v. Swank, 105 Pa. St. 555; Edmundson v. Pittsburgh etc. R. R. Co. 111 Pa. St. 316.

4 Ireland v. Metropolitan Elevated R'y Co. 52 N. Y. Super. Ct. 450; Cassidy v. Old Colony R. R. Co. 141 Mass. 174; Beseman v. Pennsylvania R. R. Co. 50 N. J. 235; S. C. 33 Am. & Eng. R. R. Cas. 107; Pennsylvania R. R. Co. v. Marchant, 119 Pa. St. 54; S. C. 33 Am. & Eng. R. R. Cas. 116; *Johnson v. Atlantic etc. R. R. Co.* 35 N. H. 569; 69 Am. Dec. 560; Russell v. St. Paul etc. R'y Co. 33 Minn. 210; Putnam v. Douglas Co. 8 Or. 328, and cases cited in the following note. In reckoning the damages for land appropriated by a railroad company, an injury to personal property or the expense of removing it from the land cannot be taken into consideration: In re New York Central etc. R. R. Co. 35 Hun, 306; In re New York etc. R'y Co. 35 Hun, 633.

5 Harris v. Thompson, 9 Barb. 350; Steele v. Inland Locks, 2 Johns. N. Y.) 283; Mohawk Bridge Co. v. Utica etc. R. R. Co. 6 Paige Ch. (N. Y.) 554; Hamilton v. New York etc. R. R. Co. 9 Paige Ch. (N. Y.) 171; *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 1; 31 Am. Dec. 313; annotated; Fletcher v. Auburn R. R. Co. 25 Wend. 462; *Canal Co. v. Railroad Co.* 9 Paige (N. Y.) 323; *Crittenden v. Wilson*, 5 Cow. 165; 15 Am. Dec. 462; Browne v. Cayuga R. R. Co. 12 N. Y. 487; Attorney-General v. Birmingham, 4 Kay & J. 528; Johnson v. Providence R. R. Co. 10 R. I. 365; *Merrifield v. Worcester*, 110 Mass. 216; 14 Am. Rep. 592; *State v. Parrott*, 71 N. C. 311; 17 Am. Rep. 5; *Lexington etc. R. R. Co. v. Applegate*, 8 Dana, 289; 33 Am. Dec. 497; Rex v. Morris, Barn. & Adol. 441; Attorney-General v. Metropolitan Board of Works, 1 Hem. & M. 320; Ware v. Regent's Canal Co. 3 DeGex & J. 227; Coats v. Clarence etc. R'y Co. 1 Russ. & M. 181; Stainton v. Woolrych, 23 Beav. 234; Broadbent v. Imperial Gas Co. 7 DeGex, M. & G. 459; Doud v. Mason City etc. R. R. Co. (1889) 76 Iowa, 438.

6 Jones v. St. Louis etc. R'y Co. 84 Mo. 151.

7 Damages for the appropriation of land for railroad purposes cannot include the amount of an injury to land outside the right of way by a trespass in removing soil therefrom, in the construction of the road, but such damages are to be recovered in a separate proceeding: Doud v. Mason City etc. R. R. Co. (1889) 76 Iowa, 438.

§ 825. Of consequential injuries.—In the absence of statutory provision, a railway company is not liable for necessary consequential injuries to land-owners, no portion of whose land is taken, where it constructs and operates its roads in a skillful and prudent manner.[1]

1 *Radcliff v. Brooklyn*, 4 N. Y. 195; 53 Am. Dec. 357 (annotated); Seneca Road Co. v. Auburn etc. R. R. Co. 5 Hill (N. Y.), 170; Corey v. Buffalo etc. R. R. Co. 23 Barb. 482; Hamlin v. Chicago etc. R'y Co. 61 Wis. 515; Stetson v. Chicago etc. R. R. Co. 75 Ill. 74; Freeland v. Pennsylvania R. R. Co. 66 Pa. St. 91; Spanger's Appeal, 94 Pa. St. 387; Beseman v. Pennsylvania R. R. Co. 50 N. J. 235; S. C. 33 Am. & Eng. R. R. Cas. 107; Monongahela Navigation Co. v. Coons, 6 Watts & S. 101; In re Philadelphia etc. R. R. Co. 6 Whart. (Pa.) 25; Hatch v. Vermont Central R. R. Co. 25 Vt. 49; Richardson v. Vermont Central R. R. Co. 25 Vt. 465; Sunbury etc. R. R. Co. v. Hummell, 27 Pa. St. 99; Clarke v. Birmingham etc. R. R. Co. 41 Pa. St. 147; Struthers v. Dunkirk etc. R. R. Co. 87 Pa. St. 282; Thompson v. Androscoggin R. R. Co. 58 N. H. 108.

§ 826. **Of speculative damages.**—Speculative damages—mere conjectural evils and inconveniences—should not be considered in estimating damages to which the owner is entitled.[1] Only those circumstances are to be taken into account that immediately depreciate the value of the premises.[2] Thus, the liability of teams of horses to be frightened, and the probable injury to them and to persons resulting therefrom, is too remote to constitute an element of damage.[3] Neither is the owner of land entitled to speculative damages for the negligent construction or operation of the railway.[4] So, the increased risk to an orchard, by reason of leaving it more free of access to persons traveling along the railroad, and to tramps and employees of the railroad company, is too remote and speculative to constitute an element of damage.[5] The possibility of future changes in the plans of the company taking the land is too remote and speculative to be considered.[6] The existence of a law requiring trains, before crossing other lines, to stop, is not a proper element of damage; it is too vague, indefinite, and contingent.[7] In determining the damages to certain property, on which a mill was located, by reason of an appropriation of part of it by a railway company, it was held not allowable to in-

clude the loss to the milling business from an increase of competition induced by the railway.[8]

1 Sedalia etc. R'y Co. v. Abell, 18 Mo. App. 632; Setzler v. Pennsylvania etc. R. R. Co. 112 Pa. St. 56. *Cf.* Chicago etc. R. R. Co. v. Dresel, 110 Ill. 89.

2 Henry v. Dubuque etc. R. R. Co. 2 Iowa, 288; Bangor etc. R. R. Co. v. McComb, 60 Me. 290; Fremont etc. R. R. Co. v. Whalen, 11 Neb. 535; Petition of Mount Washington Road Co. 35 N. H. 134; *Patten v. Northern Central R'y Co.* 33 Pa. St. 426; 75 Am. Dec. 612.

3 Guess v. Stone Mountain etc. R'y Co. 72 Ga. 320; Atchison etc. R. R. Co. v. Lyon, 24 Kan. 745; Wooster v. Sugar Valley R. R. Co. 57 Wis. 311. See, however, Dreher v. Iowa etc. R. R. Co. 59 Iowa, 399.

4 Setzler v. Pennsylvania etc. R. R. Co. 112 Pa. St. 56; Fremont etc. R. R. Co. v. Whalen, 11 Neb. 585.

5 Kansas City etc. R. R. Co. v. Kregels, 32 Kan. 608.

6 Russell v. Minneapolis etc. R'y Co. 33 Minn. 210.

7 Peoria etc. R'y Co. v. Peoria etc. R'y Co. 105 Ill. 110; *Chicago etc. R. R. Co. v. Joliet etc. R'y Co.* 105 Ill. 388; 44 Am. Rep. 799.

8 Shenandoah Valley R. R. Co. v. Shepherd, 26 W. Va. 672.

§ 827. Of resulting benefits.—The older doctrine, and the one still sustained by many respectable authorities is, that special benefits may be set off against damages, and even against the value of the land taken. Under this view, it is considered proper, in determining the question of just compensation, to take into account both the damages and the benefits, so far as the benefits are special and peculiar to the owner of the land taken or injured.[1] Thus, the fact that property is connected with the main line of railway by a switch, may be considered as enhancing its value and mitigating the injury.[2] And if an adjustment made on these principles shows that the benefits are equal to the damages, the owner is awarded nothing, but is regarded as having received full compensation in benefits.[3] But another and probably better rule is that special benefits may be considered in estimating the damages only to the portion of the land not

taken, and that they cannot be offset against the value of the part actually condemned and appropriated.[4] In the application of this rule, the value of the land taken must be paid in money; but if the land not taken is specially injured, the special benefits, if any, that it receives may be deducted from the amount of the damages, in order to determine what is just compensation for the injury to the land not taken.[5] But benefits to one piece of land cannot be set off against damages to another piece, although the two may belong to the same owner.[6] Nor can general advantages, such as increased facilities for reaching a market for the products of the land, be considered.[7] In estimating both benefits and injuries, those only are to be considered which are special and peculiar to the owner of the land taken or injured. Those that he sustains or receives in common with the neighborhood or community generally cannot be taken into account.[8]

1 *Livingston v. Mayor etc. of New York*, 8 Wend. 85; 22 Am. Dec. 622; *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100, WILSON, C. J., dissenting; Dupuis v. Chicago etc. R'y Co. 115 Ill. 97; *Whiteman's Ex'rs v. Wilmington etc. R. R. Co.* 2 Harr. Del. 514; 33 Am. Dec. 411; San Francisco etc. R. R. Co. v. Caldwell, 31 Cal. 367; Root's Case, 77 Pa. St. 276; Greenville etc. R. R. Co. v. Partlow, 5 Rich. 423; State v Blauvelt, 34 N. J. 261. See, also, note to *Symonds v. Cincinnati*, 45 Am. Dec. 532, and note to *Patton v. Northern Central R'y Co.* 75 Am. Dec. 616; Commissioners of Pottawattomie Co. v. O'Sullivan, 17 Kan. 58.

2 Pittsburg etc. R. R. Co. v. Robinson, 95 Pa. St. 426; S. C. 1 Am. & Eng. R. R. Cas. 468.

3 Cooley's Constitutional Limitations, 570, (marg. p.;) Whitman v Boston etc. R. R. Co. 3 Allen, 133; Nicholls v. Bridgeport, 23 Conn. 189; Trinity College v. Hartford, 32 Conn. 452; *Putnam v. Douglas Co.* 6 Or. 328; 25 Am. Rep. 527; *Livingston v. Mayor etc. of New York*, 8 Wend. 85; 22 Am. Dec. 622; Whitman v. Boston etc. R. R. Co. 3 Allen, 133; Winona etc. R. R. Co. v. Waldron, 11 Minn. 515; 88 Am. Dec. 100; Livermore v. Jamaica, 23 Vt 361; *Elgin v. Eaton*, 83 Ill. 535; 86 Am. Dec. 442; Mills on Eminent Domain, § 151. See, also, note to *Symonds v. Cincinnati*, 45 Am. Dec. 533.

4 Fremont etc. R. R. Co. v. Whalen, 11 Neb. 585; S. C. 5 Am. & Eng. R. R. Cas. 364; Jones v. Will's Valley R. R. Co. 30 Ga. 43; Newcastle etc. R. R. Co. v. Brumback, 5 Ind. 543; Swinney v. Fort Wayne etc. R. R. Co.

69 Ind. 295; Wilson v. Rockford etc. R. R. Co. 59 Ill. 273; Todd v. Kankakee etc. R. R. Co. 78 Ill. 530; Wagner v. Gage Co. 3 Neb. 237; Sutton's Heirs v. Louisville, 5 Dana, 26; Robinson v. Robinson, 1 Duvall, 62; Chapman v. Oshkosh etc. R. R. Co. 33 Wis. 629; Mitchell v. Thornton, 21 Gratt. 164; James River etc. Co. v. Turner, 9 Leigh, 313; Shipley v. Baltimore etc. R. R. Co 31 Md. 336; Raleigh etc. R. R. Co. v. Wicker, 74 N. C. 220; Mayor etc. of Atlanta v. Central Railroad & Banking Co. 53 Ga. 120; City Council of Augusta v. Marks, 50 Ga. 612; Mayor etc. of Savannah v. Hartridge, 37 Ga. 113; Henderson etc. R. R. Co. v. Dickenson, 17 Mon. B. 173; Louisville etc. R. R. Co. v. Glazebrook, 1 Bush. 325; Elizabethtown etc. R. R. Co. v. Helm, 8 Bush, 681; Woodfolk v. Nashville etc. R. R. Co. 2 Swan, 422; State v. Miller, 23 N. J. 383; Buffalo etc. R. R. Co. v. Ferris, 26 Tex. 588; Vicksburg etc. R. R. Co. v. Calderwood, 15 La. An. 431; New Orleans etc. R. R. Co. v. Lagarde, 10 La. An. 150. See also notes to *Symonds v. Cincinnati*, 45 Am. Dec. 532; and to *Patton v. Northern Central R'y Co.* 75 Am. Dec. 616.

5 See note to *Symonds v. Cincinnati*, 45 Am. Dec. 532.

6 And different blocks in a town are regarded as separate parcels: Todd v. Kankakee etc. R. R. Co. 78 Ill. 530; Koestenbader v. Pierce, 41 Iowa, 204; Buffalo etc. R. R. Co. v. Ferris, 26 Tex. 588. See note to *Symonds v. Cincinnati*, 45 Am. Dec. 532.

7 St. Louis etc. R. R. Co. v. Kirby, 104 Ill. 345; Natchez etc. R. R. Co. v. Currie, 62 Miss. 507; Chicago etc. R. R. Co. v. Wiebe, 25 Neb. 542; In re New York etc. R'y Co. 35 Hun, 263; Chicago etc. R. R. Co. v. Blake, 116 Ill. 163 *Cf.* Balfour v. Louisville etc. R. R. Co. 62 Miss. 508; *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100.

8 Cooley's Constitutional Limitations, *536 (marg. p.); St. Louis etc. R. R. Co. v. Richardson, 45 Mo. 466; Wyandotte & Co. v. Waldo, 70 Mo. 629; Hornstein v. Great Western R. R. Co. 51 Pa. St. 87; Root's Case, 77 Pa St. 276; Dickenson v. Fitchburg, 13 Gray, 546; Carpenter v. Landaff, 42 N. H. 218; Commissioners of Asheville v. Johnston, 71 N. C. 398; Keithsburg etc. R. R. Co. v. Henry, 70 Ill. 290; Carli v. Stillwater etc. R. R. Co. 16 Minn. 260; Vicksburg etc. R. R. Co. v. Calderwood, 15 La. An. 481; Mills on Eminent Domain, § 153. See notes to *Symonds v. Cincinnati*, 45 Am. Dec. 532, and to Patton v. Northern Central R'y Co. 75 Am. Dec. 616.

§ 828. Compensation to be made in "money" in some States.—In some States the right to set off benefits is not allowed in any case whatever; payment must be made in money, and cannot be made in benefits of any kind.[1] In Alabama it has been decided that "just compensation," within the meaning of the constitution of that State, must be made in money, and any increased value of the lands of the owner arising from the public works for which such lands are taken, cannot be considered in assessing the amount of compensation to be paid for the portion taken.[2] In Iowa it has been held that in assessing

the damages occasioned by the taking of private property for public use, the advantages that may result to the owner on account of the improvement for which the property is taken cannot be considered.[3] In many of the American States there are constitutional provisions relating to the setting off of benefits against the taking of private property for public use. In two of the constitutions the provision requires compensation to be made "in money;"[4] in others, that full compensation shall be made irrespective of any resulting benefit.[5] Others, again, simply provide that just compensation shall be made; but under the rulings of the courts construing these provisions, incidental resulting benefits are disallowed as a set-off.[6]

1 Robbins v. Milwaukee etc. R. R. Co. 6 Wis. 636; *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 9; 31 Am. Dec. 313, note 375; *Henderson etc. R. R. Co. v. Dickerson*, 17 Mon. B. 173; 66 Am. Dec. 148; City Council of Augusta v. Marks, 50 Ga. 612; Carpenter v. Jennings, 77 Ill. 250; New Orleans etc. R'y Co. v. Mirault, 31 La. An. 53; Rice v. Danville etc. Co. 7 Dana, 81; Isom v. Mississippi etc. R. R. Co 33 Miss. 300; Penrice v. Wallis, 37 Miss. 172; New Orleans etc. R. R. Co. v. Moye, 39 Miss. 374; Woodfolk v. Nashville etc. R. R. Co. 2 Swan, 422; Alabama etc. R. R. Co. v. Burkett, 42 Ala. 83; Butler v. Ravine Road Sewer Co. 30 N. J. 665; People v. Mayor etc of Brooklyn, 6 Barb. 209; Putnam v. Douglas Co. 8 Or. 328; *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515; 88 Am. Dec. 100, note, 113. *Cf.* Burlington v. Schwerkart, 10 Colo. 178; 30 Am. & Eng. R. R. Cas. 391.

2 Alabama etc. R. R. Co. v. Burkett, 42 Ala. 83. See, also, note to *Symonds v. Cincinnati*, 45 Am. Dec. 533, 534.

3 Israel v. Jewett, 29 Iowa, 475; Frederick v. Shane, 32 Iowa, 254.

4 Ohio Const (1851) Art. i, § 19; Art. xiii, § 5; Giesy v. Cincinnati etc. R. R. Co. 4 Ohio St. 308; Cal. Const. (1870) Art. i, § 14; Pacific Coast R. R. Co. v. Porter, 74 Cal. 261; S. C. 33 Am. & Eng. R. R. Cas. 167.

5 Kans. Const. Art. xii, § 4; Commissioners v. O'Sullivan, 17 Kan. 53; Iowa Const. (1857) Art. i, § 18; Frederick v. Shane, 32 Iowa, 254; Israel v. Jewett, 29 Iowa, 475.

6 Ill. Const. (1870) Art. ii, § 13; Carpenter v. Jennings, 77 Ill. 250; Texas Const. (1876) Art. i § 17; City of Paris v. Mason, 37 Tex. 447; Ark. Const. (1874) Art. ii, § 22; Whitehead v. Arkansas etc. R. R. Co. 23 Ark. 460. But see Wyandotte etc. R'y Co. v. Waldo, 70 Mo. 629, construing Mo. Const. (1875) Art. ii, § 21.

§ 829. Of interest upon the award.—When the damages awarded are not paid immediately upon

the taking of land by a railway company, interest is allowable thereon from the time of the taking,[1] and the decree on an appeal from the award should so direct.[2] In an action against two railroad companies for damages for taking land, one being the company which had the land condemned, and the other being the present owner through foreclosure proceedings, each should be charged with interest from the time when it entered into possession.[3]

1 *Cohen v. St Louis etc. R R. Co* 34 Kan 158; 55 Am. Rep. 242; Warren v. First Division St. Paul etc. R. R. Co. 21 Minn. 424; Johnson v. Atlantic etc. R. R. Co. 43 N H. 410; Delaware etc. R. R. Co. v. Burson, 61 Pa. St. 369; West v. Milwaukee etc. R'y Co. 56 Wis. 318; Missouri River etc R. R. Co. v. Owen, 8 Kan. 409; Bangor etc. R. R. Co. v. McComb, 60 Me. 290; Edmunds v. City of Boston, 108 Mass. 535; Kidder v. Inhabitants of Oxford, 116 Mass. 165; *City of Chicago v. Wheeler*, 25 Ill. 478; 79 Am. Dec. 342; Cook v. South Park Commissioners, 61 Ill. 115; Illinois etc. R. R. Co. v. McClintock, 63 Ill. 296; Hollingsworth v. Des Moines etc. R'y Co. 63 Iowa, 413; Sweaney v. United States, 62 Wis. 396; Mills on Eminent Domain, § 175. *Cf.* Note to *Winona etc. R. R. Co. v. Waldron*; 83 Am. Dec. 100, 113; S. C. 11 Minn. 515.

2 Reed v. Chicago etc. R'y Co. 25 Fed. Rep. 886.

3 Adams v. St Johnsbury etc. R. R. Co. 57 Vt. 240, 660.

§ 830. Wrongful entry—Ejectment—Trespass. When a railway company has entered upon land for the purpose of constructing its road, without having complied with all the statutory provisions respecting condemnation, or without having paid, or deposited, or given security for, the amount awarded, or when it wastes the land beyond the limits of its right of way,[1] the land-owner may bring an action in ejectment,[2] or in trespass, to recover damages for the injury to his property.[3] The petition in the action for trespass must allege a wrongful entry,[4] for when a company enters under color of title, as with the consent of a party in possession, it is not to be regarded as a trespasser.[5] But irregular condemnation proceedings do not give

such color of title as to constitute a bar to the action for ejectment or trespass.[6]

1 McCord v. Doniphan Branch R'y Co. 21 Mo. App. 92.

2 Lozier v. New York Central R. R. Co. 42 Barb. 466; Baker v. Long Island R. R. Co. 1 How. Pr. 214; Wilmington & Reading R. R. Co. v. High, 89 Pa. St. 282; Robinson v. Pittsburg R. R. Co. 57 Cal. 417; McClinton v. Pittsburg etc. R. R. Co. 66 Pa. St. 404; Chicago etc. R. R. Co. v. Knox College, 34 Ill. 195; Congler v. Burlington etc. R. R. Co. 41 Iowa, 419; Gilman v. Sheboygan R. R. Co. 40 Wis. 653; Levering v. Philadelphia etc. R. R. Co. 8 Watts & S. 459; St. Joseph etc. R. R. Co. v. Callendar, 13 Kan. 496; Holbert v. St. Louis etc. R. R. Co. 45 Iowa, 23; Smith v. Chicago etc. R. R. Co. 67 Ill. 191; Harrington v. St. Paul etc. R. R. 17 Minn. 215; Cox v. Louisville etc. R. R. Co. 48 Ind. 178; New Orleans v. Selma R. R. Co. 70 Ala. 227; Galveston etc. R. R. Co. v. Pfeuffer, 53 Tex. 65; Rusch v. Milwaukee etc. R. R. Co. 54 Wis. 136; Susquehanna etc. R. R. Co. v. Quick, 68 Pa. St. 189; Stewart v. Camden etc. R. R. Co. 33 N. J. 115.

3 Blodgett v. Utica etc R. R. Co. 64 Barb. 480; Robinson v. New York etc. R. R. Co. 27 Barb. 512; McCord v. Doniphan Branch R'y Co. 21 Mo. App. 92; *Cohen v. St. Louis etc. R. R. Co.* 31 Kan. 153; 55 Am. Rep. 242; Tiesman v. Belvidere etc. R. R. Co. 27 N. J. 148; South Carolina R. R. Co. v. Steiner, 44 Ga. 546; *Eaton v. Boston etc. R. R. Co.* 51 N. H. 504; 12 Am. Rep. 147; Memphis etc. R. R. Co. v. Payne, 37 Miss. 700; Sherman v. Milwaukee etc. R. R. Co. 40 Wis. 645; Henry v. Dubuque R. R. Co. 10 Iowa, 540; Hibbs v. Chicago etc. R. R. Co. 39 Iowa, 340; Indiana R. R. Co. v. Boden, 10 Ind. 96; Hooker v. New York etc. R. R. Co. 14 Conn. 146; Rush v. Milwaukee etc. R. R. Co. 54 Wis. 136; Justice v. Nesquehoning Valley R. R. Co. 87 Pa. St. 23; Evansville etc. R. R. Co. v. Dick, 9 Ind. 433; Murray v. Fitchburg R. R. Co. 130 Mass. 99; Smart v. Portsmouth etc. R. R. Co. 20 N. H. 233; Buffalo Bayou etc. R. R. Co. v. Ferris, 26 Tex. 588; Dury v. Midland R. R. Co. 127 Mass. 571; Matthew v. St. Paul etc. R. R. Co. 18 Minn. 434; *Lee v. Pembroke Iron Co.* 57 Me. 481; 2 Am. Rep. 59; Cushman v. Smith, 34 Me. 247. But in Tennessee, under Acts 1851-52, ch. 151 (old Code, § 1119), which operate as a general amendment to the charters of such railroad companies as expressly or impliedly accept its provisions, a company is not liable in trespass for taking land before it is condemned, but damages may be appraised as in proceedings for condemnation: Louisville & N. R. R. Co. v. Quinn, 14 Lea, 65.

4 Robertson v. Springfield etc. R'y Co. 18 Mo. App. 185.

5 Tompkins v. Augusta etc. R. R. Co. 21 S. C. 420.

6 Ewing v. St. Louis, 5 Wall. 513; Peoria R. R. Co. v. Schertz, 84 Ill. 135; Blaisdell v. Winthrop, 118 Mass. 138; Bathe v. Dayton etc. R. R. Co. 37 Ohio St. 147.

§ 831. Of the measure of damages in an action for trespass.—The measure of damages in an action of trespass against the company for a wrongful entry is not the value of the land, but the actual loss sustained by the plaintiff,[1] such as the injury resulting to plaintiff's crops, orchards, pastures, fences, and the mesne profits of the land

accruing during the continuance of the trespass.[2] The damages given in the action for trespass can include only past injuries, and successive suits are necessary to recover for the injury sustained by a continuance of the trespass,[3] except where the injury done is permanent in its nature and goes to the entire value of the estate, in which case damages to the full amount of the injury may be recovered once for all in a single action.[4] The satisfaction of a judgment for trespass does not validate the taking of the land. The company continues liable to successive suits until it shall acquire a right of way by regular proceedings under the statute.[5] The wrongful entry does not bar subsequent proceedings to condemn.[6] When such proceedings are instituted by the company, the damages for the trespass are not to be added to the award for the condemnation.[7] That is to say, the construction of a railway upon the land wrongfully, cannot be considered as increasing the amount of compensation in subsequent proceedings to condemn.[8] Nor are the damages given in an action for trespass to be deducted from the amount awarded in condemnation proceedings subsequently instituted.[9]

1 Republican Valley R. R. Co. v. Fink, 18 Neb. 82.

2 Houston etc. R'y Co. v. Adams, 63 Texas, 200.

3 Blodgett v. Utica etc. R. R. Co. 64 Barb. 540; Anderson R. R. Co. v. Knoedle, 54 Ind. 314; Hartt v. St. Paul R. R. Co. 21 Minn. 358; Harrington v. St. Paul R. R. Co. 17 Minn. 215; Adams v. Hastings R. R. Co. 18 Minn. 260. *Cf.* Houston etc. R'y Co. v. Adams, 63 Texas, 200, where it was held that the probable value of future crops cannot be recovered.

4 Blunt v. McCormick, 3 Denio, 283; Estabrook v. Erie R. R. Co. 51 Barb. 91; Chase v. New York Central R. R. Co. 24 Barb. 273; Chicago etc. R. Co. v. Stein, 75 Ill. 41; Lamb v. Walker, Law R. 3 Q. B. Div. 389; Chicago etc. R. R. Co. v. Carey, 90 Ill. 514; Chicago etc. R. R. Co. v. ——, 99 Ill. 33; *Troy v. Cheshire R. R. Co.* 23 N. H. 83, 101; 55 Am. Dec. Cheshire Turnpike Co. v. Stevens, 13 N. H. 28; Parks v. City of Boston, 15 Pick. 198; *Thayer v. Brooks*, 17 Ohio, 488; 49 Am. Dec. 474;

Fowle v. New Haven etc. R. R. Co. 107 Mass. 352; Cooper v. Randall 59 Ill. 317; Dickson v. Chicago etc. R. R. Co. 71 Mo. 575; *Central Branch Union etc. R. R. Co. v. Twine*, 23 Kan. 585; 33 Am. Rep. 203.

5 Plate v. New York Central R. R. Co. 37 N. Y. 472; Mahon v. New York Central R. R. Co. 24 N. Y. 658; *Bird v. Wilmington etc. R. R. Co.* 8 Rich. Eq. 46; 64 Am. Dec. 739; Anderson etc. R. R. Co. v. Kernodle, 54 Ind. 314; *Bare v. Hoffman R. R. Co.* 79 Pa. St. 71; 21 Am. Rep. 42; Hetfield v. Central R. R. Co. 34 N. J. 251; Carl v. Sheboygan etc. R. R. Co. 46 Wis. 325; Cain v. Chicago etc. R. R. Co. 54 Iowa, 225; Dickson v. Chicago etc. R. R. Co. 71 Mo. 575.

6 State v. Baker, 20 Fla. 616.

7 Blodgett v. Utica etc. R. R. Co. 64 Barb. 580; McClinton v. Pittsburgh etc. R. R. Co. 66 Pa. St. 404; Missouri etc. R. R. Co. v. Ward, 10 Kan. 352; Selma etc. R. R. Co. v. Keith, 53 Ga. 178; Praetz v. St. Paul R. R. Co. 17 Minn. 163. *Cf.* Harrington v. St. Paul etc. R. R. Co. 17 Minn. 215; Pierce v. Worcester etc. R. R. Co. 105 Mass. 199; Central R. R. Co. v. Hetfield, 29 N. J. 206.

8 Toledo etc. R. R. Co. v. Dunlap, 47 Mich. 456.

9 Blodgett v. Utica R. R. Co. 64 Barb. 580; Harsh v. St. Paul R. R. Co. 17 Minn. 439; Oregon R. R. Co. v. Barlow, 3 Or. 311; Chicago etc. R. R. Co. v. Davis, 86 Ill. 20; Leber v. Minneapolis etc. R. R. Co. 29 Minn. 256.

CHAPTER XXXII.

THE PROCEDURE IN CONDEMNATION.

§ 832. Introductory.
§ 833. The New York statute.
§ 834. Of notice.
§ 835. Of the petition.
§ 836. Of the corporate existence of the plaintiff, and of its authority to condemn.
§ 837 Of the ownership of the defendant.
§ 838. Description of the land taken.
§ 839. Evidence.
§ 840. Admissibility of opinions of witnesses.
§ 841. Admissibility of evidence as to sales of lands in the vicinity.
§ 842. Of the verdict or report.
§ 843. Of the judgment, and the order of confirmation.
§ 844. Of appeals and removal of causes.
§ 845. Costs.
§ 846. Of the discontinuance of proceedings.
§ 847. The same subject, continued—When the rights of the parties become vested.
§ 848. Of the owner's remedies—*(a)*. Under the statute.
§ 849. *(b)*. By injunction.
§ 850. *(c)*. In ejectment.
§ 851. *(d)*. In trespass.
§ 852. Laches—Limitations.

§ 832. **Introductory.**—Proceedings to condemn private property for public use are ordinarily instituted by an application in writing to the officer or tribunal whose jurisdiction is to be invoked. The form of the application being necessarily dependent upon the statutes of the several States, it would be useless to look for any general principle under-

lying the subject.[1] It may be stated, however, as a general rule, that all the conditions precedent to the exercise of the power must be performed, and all the steps required by the statute must be taken.[2] But a substantial compliance therewith is sufficient.[3] When the application is made to a court and the damages are assessed by an ordinary jury, the jurors are usually selected from the regular panel in the same manner as in other jury trials. But where the damages are to be assessed by a special jury or by commissioners, their selection is regulated by the general statute or the charter of the company.[4] The constitutional right of the land-owner to a trial by jury is not lost by the failure of the legislature to prescribe the manner in which it shall be exercised.[5] The right of a railroad company to have the damages for appropriating land appraised in a special manner, does not constitute a franchise, but operates merely as a personal privilege which it has no authority to transfer.[6] Proceedings for condemnation must be brought in the county in which the land is located.[7] Where the court is required to fix a "place of meeting" at which the commissioners, appointed to assess the damages to lands taken by a railroad, shall hold their first meeting, it is not sufficient to appoint a certain village, the limits of which embrace two square miles of territory.[8]

1 Lewis on Eminent Domain, § 342.

2 Adams v. Saratoga etc. R. R. Co. 10 N. Y. 328; O'Hara v. Pennsylvania R. R. Co. 5 Pa. St. 445; Wilson v. Lynn, 119 Mass. 117; Pennsylvania R. R. Co. v. Porter, 29 Pa. St. 155; Blaisdell v. Winthrop, 118 Mass. 133; Wilmington v. Wilmington etc. R. R. Co. 2 Harr. (Del.), 514; 33 Am. Dec. 411; White v. Nashville etc. R. R. Co. 7 Heisk. (Tenn.) 518; Lund v. New Bedford, 121 Mass. 235; Warner's Power Co. v. Allen, 120 Mass. 352; City of Buffalo, in re Leroy v. Framingham etc. R. R. Co. 119 Mass. 316; Levering v. Philadelphia etc. R. R. Co. 8 Watts & S. 458.

3 Indianapolis etc. R. R. Co. v. Christian, 93 Ind. 360; Shields v. Mo-

Mahan, 101 Ind. 591; Heick v. Voight, 110 Ind. 279; McCallister v. Shuey, 24 Iowa, 362; State v. Pitman, 38 Iowa, 252; Stevens v. Board of Supervisors, 41 Iowa, 341; Townsend v. Chicago & Alton R. R. Co. 51 Ill. 515; Byron v. Blount, 97 Ill. 62; Raymond v. County Comm'rs, 63 Me. 112; In re Grove St. 61 Cal. 438.

4 See Lewis on Eminent Domain, § 400 *et seq.*

5 Kansas City etc. R. R. Co. v. Story, 96 Mo. 611, where it was also held that in proceedings to condemn land for railway purposes, the right of trial by jury as to the amount of compensation, guarantied by the constitution (Mo. Const. art. xii, § 4), is not waived by the appearance of the owner before the judge in vacation pursuant to notice, and the appointment of commissioners at his request; and that a demand for a jury, after their report is filed and he has excepted thereto, is in time.

6 Little Rock & F. S. R'y Co. v. McGehee, 41 Ark. 202.

7 Missouri Pacific R'y Co. v. Carter, 85 Mo. 448.

8 Minneapolis & S. L. R'y Co. v. Kaune, 32 Minn. 174.

§ 833. The New York statute.—The New York statute may be given as an example of the legislation on this subject, and of the steps which the railway company must take to acquire its right of way. The General Railroad Act of 1850, in that State, provides that "for the purpose of acquiring such title, the said company may present a petition praying for the appointment of commissioners of appraisal to the supreme court, at any general or special term thereof held in the district in which the real estate described in the petition is situated. Such petition shall be signed and verified according to the rules and practice of such court. It must contain a description of the real estate which the company seeks to acquire, and it must, in effect, state that the company is duly incorporated, and that it is the intention of the company, in good faith, to construct and finish a railroad from and to the places named for that purpose in its articles of association; that the whole capital stock of the company has been in good faith subscribed as required by the act; that the company has surveyed the line or route of its proposed road and made a

map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said route is to be constructed; that the land described in the petition is required for the purpose of constructing or operating the proposed road, and that the company has not been able to acquire title thereto, and the reason of such inability. The petition must also state the name and places of residence of the parties, so far as the same can, by reasonable diligence, be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate, and if any such persons are infants, their ages, as near as may be, must be stated; and if any of such persons are idiots, or persons of unsound minds, or are unknown, the fact must be stated, together with such other allegations and statements of liens or incumbrances on said real estate as the company may see fit to make. A copy of such petition, with a notice of the time and place the same will be presented to the supreme court, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the presentation of the same to the said court.[1] The statute further provides the manner of serving notice upon residents and non-residents, when their residence is known and when unknown, and the manner of serving upon infants and idiots. In other cases not provided for, notice and other papers in the special proceedings may be served as the supreme court shall direct.[2]

1 N. Y. Laws of 1850, ch. 140, § 14.

2 N. Y. Laws of 1850, ch. 140, § 14, sub-secs. 1, 2, 3, 4, 5 and 7.

§ 834. **Of notice.**—The land-owner is entitled to notice;[1] and condemnation proceedings had without notice may be set aside on *certiorari*.[2] The citizen is entitled to an impartial tribunal to assess the amount of his damages, and to a hearing by it. A statute designating by name three persons to determine the compensation, and giving the land-owner no opportunity to be heard, and to make proof of damages, is unconstitutional.[3] The legislature, however, may provide for constructive notice by publication.[4] It is held in New York that the notice prescribed in the statute[5] is due only to land-owners along the line of the road whose names are inscribed on the assessment rolls.[6] In proceedings for condemnation, a notice to "A., and all other persons having any interest in, or owning any of, the following real estate," is binding only upon A.[7] A railway company can condemn land belonging to a minor only by joining as defendant to the proceedings for condemnation, his guardian, or, in case he has none, a guardian *ad litem* appointed by the court.[8]

1 Tracey v. Elizabethtown etc. R. R. Co. 80 Ky. 259; Atlantic etc. R. R. Co. v. Cumberland County Comm'rs, 51 Me. 36; Reitenbaugh v. Chester Valley R. R. Co. 21 Pa. St. 100; Baltimore etc. R. R. Co. v. Pittsburg etc. R. R. Co. 17 W. Va. 812; Burns v. Multoomah R'y Co. 8 Sawy. 543; Union Pacific R'y Co. v. Leavenworth etc. R'y Co. 29 Fed. Rep. 728.

2 Case v. Thompson, 6 Wend. 634; People v. Supervisors, 36 How. Pr. 544; State v. Jersey City, 25 N. J. 309; Seifert v. Brooks, 34 Wis. 443; Stone v. Boston, 2 Met. 220; Wood v. Commissioners, 62 Ill. 391; Atlantic R. R. Co. v. Comm'rs, 51 Me. 36; Ware v. Comm'rs, 38 Me. 492; Anderson v. Taberville, 6 Cold. 150; Skinner v. Lake View Av. Co. 57 Ill. 151; Joliet R. R. Co. v. Barrows, 24 Ill. 562.

3 Langford v. Commissioners of Ramsey County, 16 Minn. 380.

4 St. Paul etc. R. R. Co. v. Minneapolis, 35 Minn. 141; 24 Am. & Eng. R. R. Cas. 309.

5 N. Y. Laws 1884, ch. 252, § 5.

6 In re Broadway Surface R. R. Co. 34 Hun, 414.
7 Birge v. Chicago M. R'y Co. 65 Iowa, 440.
8 Missouri Pacific R'y Co. v. Carter, 85 Mo. 448.

§ 835. **Of the petition.**—If the statute require a petition, it is indispensable to jurisdiction;[1] and even when it is not required in express terms, it is usually held to be the only proper mode of making the application.[2] A petition or instrument of appropriation for the condemnation of land, where the attack is a direct and not a collateral one, should show the facts upon which the jurisdiction of the court to move in the case depends.[3] Its allegations should be certain and positive,[4] giving the names of the owners, or occupants;[5] describing the property to be taken and the location of the road,[6] showing that the use for which the property is to be taken is within the statutory powers conferred upon the company,[7] and that a public necessity for its taking exists.[8] But a railway company may prove a *prima facie* right on its part to condemn land, by showing that it exists under a valid charter.[9] If the statute require the company to make efforts to acquire the property by purchase before resorting to compulsory proceedings, the petition should allege that the parties have been unable to agree.[10] A mere declaration on the part of the company, in its petition, that it is unable to acquire title, will suffice to establish jurisdiction, even though the details are not set forth so clearly as they should be, and for such defect a reversal will not be granted on appeal if it appear that the point has been fully covered by the evidence.[11] To acquire additional land it is not necessary for a railroad company to use the same

particularity in its allegations as was essential in the original proceedings, nor need it show its determination by a formal resolution of its directors.[12] If the proceedings be brought by the land-owner, his petition should set forth the nature of his title or interest in the land,[13] and the general nature of the injury for which he seeks compensation.[14] The courts are usually liberal in allowing amendments of the petition.[15] A statute authorizing defects and informalities in any special proceedings to be amended, empowers the court to allow an amendment in the description of the land to be condemned.[16] And mere formal defects are waived by taking any step which implies an admission of the sufficiency of the petition, such, for example, as going to a hearing without objection.[17] But jurisdictional defects may be taken advantage of at any stage of the proceedings.[18]

1 State v. Berry, 12 Iowa, 58; Oliphant v. Comm'rs of Atkinson County, 18 Kan. 386; Commonwealth v. Peters, 3 Mass. 229; People v. Judge of Recorder's Court, 40 Mich. 64; State v. Otoe Co. 6 Neb. 129; Wiggin v. Exeter, 13 N. H. 304; Hayward v. Charlestown, 34 N. H. 23; Clement v. Burns, 43 N. H. 609; Bennett v. Cutler, 44 N. H. 69; State v. Morse, 50 N. H. 98.

2 Lewis on Eminent Domain, § 343; Commonwealth v. Coombs, 2 Mass. 489; Kroop v. Forman, 31 Mich. 144; Vail v. Morris & Essex R. R. Co. 21 N. J. 189.

3 Lake Shore & M. S. R. R. Co. v. Cincinnati etc. M. R. R. Co. 116 Ind. 578.

4 Hays v. Campbell, 17 Ind. 430; Thayer v. Burger, 100 Ind. 262, where allegations upon belief were held sufficiently positive; Martin v. Franklin Co. 62 Me. 455; Honenstine v. Vaughan, 7 Black. 520; Hughes v. Sellers, 34 Ind. 347; People v. Whitney's Point, 32 Hun. 508; Milhollin v. Thomas, 7 Ind. 165; Russell v. Turner, 62 Me. 496; Miller v. Porter, 71 Ind. 521; Carr v. State, 103 Ind. 548.

5 As to the meaning of the word owner, *vide supra*, § 791; In re Commissioners of Washington Park, 52 N. Y. 131; In re Flatbush Ave. 1 Barb. 286.

6 In re New York Central etc. R. R. Co. 70 N. Y. 191; Spofford v. Bucksport etc. R. R. Co. 66 Me. 26; Mansfield etc. R. R. Co. v. Clark, 23 Mich. 519; Wilkin v. First Division etc. 16 Minn. 271; Quincy etc. R. R. Co. v. Kellogg, 54 Mo. 334. *Vide infra*, § 838.

7 In re New York Central etc. R. R. Co. 5 Hun, 86; Railway Co. v. Bohn, 34 Ohio St. 114.

8 Grand Rapids etc. R. R. Co. v. Van Driels, 24 Mich. 409.

9 Chicago & N. R'y Co. v. Chicago & E. R. R. Co. 112 Ill. 589.

10 In re Lockport & Buffalo R. R. Co. 77 N. Y. 557; Contra Costa R. R. Co. v. Moss, 23 Cal. 323; Reitenbaugh v. Chester Valley R. R. Co. 21 Pa. St. 100; O'Hara v. Pennsylvania R. R. Co. 23 Pa. St. 415; Darlington v. United States, 82 Pa. St. 382; 22 Am. Rep. 766; Hannidal & St. Joseph R. R. Co. v. Muder, 49 Mo. 165; In re Suburban Rapid Transit Co 38 Hun, 553; S. C. 16 Abb. N. Cas. 152; United States v. Oregon R'y etc. Co. 9 Sawyer, 61; Pennsylvania R. R. Co. v. Porter, 29 Pa. St. 165

11 In re Suburban Rapid Transit Co. 38 Hun, 553.

12 In re New York Central & H. R. R. R. Co. 33 Hun, 274.

13 Nelson v. Butterfield, 21 Me. 220; Schoff v. Upper Conn. River etc. Co. 57 N. H. 110; Faville v. Green, 12 Wis. 11.

14 Drury v. Midland R. R. Co. 127 Mass. 571.

15 Pennsylvania R. R. Co. v. Lutheran Congregation, 53 Pa. St. 445; Windham v. Litchfield, 22 Conn. 226; In re Rochester, Hornellsville etc. R'y Co, 45 Hun, 126; Pennsylvania R. R. Co. v. Porter, 29 Pa. St. 165; Pennsylvania etc. R. R. Co. v. Bunnell, 81 Pa. St. 414; Midland R'y Co. v. Smith, 109 Ind. 488.

16 Hunt v. New York Central R'y Co. 99 Ind. 593, construing Ind. Rev. Stat. § 3909.

17 Sowle v. Cisner, 56 Ind. 276; Hughes v. Sellers, 34 Ind. 337; Palmer v. Highway Comm'rs, 49 Mich. 45; Bachelor v. New Hampton, 60 N. H. 207.

18 Lewis on Eminent Domain, § 362; Forsyth v. Kreuter, 100 Ind. 27.

§ 836. Of the corporate existence of the plaintiff, and of its authority to condemn.—The corporate existence of the company may be denied by the land-owner,[1] in which case it is sufficient, however, for the company to prove a *de facto* existence. On such an issue, copies of articles of incorporation of the railroad company may be offered in evidence, and, if satisfactory to the court, introduced to the jury.[2] In Illinois, parties may be compelled to trial in condemnation proceedings before disposal of a plea of *nul tiel* corporation, there being no law in that State allowing any kind of answer to a petition for the condemnation of land.[3]

1 In re Staten Island Rapid Transit R. R. Co. 38 Hun, 331; In re Brooklyn etc. R'y Co. 72 N. Y. 245; Wilkie v. Prairie du Chien etc. R'y Co. 34 Wis. 533. *Contra*, West End etc. R. R. Co. v. Almeroth, 13 Mo. App. 91.

2 Henry v. Centralia R. R. Co. 121 Ill. 264.

3 Henry v. Centralia etc. R. R. Co. 121 Ill. 264.

§ 837. Of the ownership of the defendant.— In proceedings for condemnation, a railroad company is not bound to prove the fact of ownership in one to whom it has given notice as owner;[1] nor on the other hand, can it dispute his title,[2] the institution of proceedings against him by the company being an acknowledgment thereof.[3] Thus, when persons named on the records as the owners of land, refused a right of way to a railroad company, which thereupon instituted proceedings for condemnation, and was subsequently allowed to construct its road over the land, the damages to be fixed by the commission, the company was held estopped from denying the ownership of such persons and their right to the damages assessed.[4] But when it is the owner who institutes the proceedings, it is requisite that he should prove his title, unless it be admitted by the pleadings.[5] So also, in considering damages to lands not taken, the owner must establish his title thereto.[6]

1 Cummins v. Des Moines & St. Louis R'y Co. 63 Iowa, 397.

2 Selma R. R. Co. v Camp, 45 Ga. 180; St. Paul etc. R. R. Co. v. Matthews, 16 Minn. 341; St. Louis R. R. Co. v. Peters, 68 Ill. 144; Peoria etc. R. R. Co. v. Bryant, 57 Ill. 473; Peoria etc. R. R. Co. v. Laurie, 63 Ill. 264; Crise v. Auditor, 17 Ark. 572; Norristown Turnpike v. Burkett, 26 Ind. 53; Knauft v. St. Paul etc. R. R. Co. 22 Minn. 173; Rippe v. Chicago etc. R. R. Co. 23 Minn. 18.

3 Bentonville R. R. Co. v. Stroud, 45 Ark. 278.

4 Omaha N. R. R. Co. v. Gerrard, 17 Neb. 587.

5 Benson v. Soule, 32 Me. 39; La Fayette v. Wortman, 107 Ind. 404; Costello v. Burke, 63 Iowa, 361; Waltemeyer v. Wisconsin etc. R. R. Co. 71 Iowa, 625; Jones' Heirs v. Barclay, 2 Marsh J. J. 73; Nelson v. Butterfield, 21 Me. 220; Minot v. Cumberland County Comm'rs, 23 Me. 121; Thurston v. Portland, 63 Me. 149; Brainard v. Boston etc. Central R. R. Co. 12 Gray, 407; Tufts v. Charlestown, 117 Mass. 401; Philadelphia etc. R. R. Co. v. Obert, 109 Pa. St. 193; Winchester v. Stevens Point, 58 Wis. 350; Peoria etc. R. R. Co. v. Bryant, 57 Ill. 473; Robbins v. Milwaukee etc. R. R. Co. 6 Wis. 636; Allyn v. Providence R. R. Co. 4 R. I. 457; Directors of the Poor v. Wrightsville etc. R. R Co. 7 Watts & S. 236; Lewis on Eminent Domain, § 440.

6 St. Paul etc. R. R. Co. v Matthews, 16 Minn. 341. As to what title in lands is sufficient as the basis of recovery, *vide supra*, § 791.

§ 838. Description of the land taken.—The petition should describe the land which the company desires to condemn;[1] but possession by the railway, acquiesced in by the land-owner, will cure a defective description.[2] The statute of West Virginia,[3] requiring land to be described with "reasonable certainty" in proceedings for condemnation, was held sufficiently complied with in a case where it was stated to be a strip thirty feet wide on each side the center line of the road, containing three and ninety-nine hundredths acres, beginning at a point where the center line of the road as located crosses the boundary line of the land-owner, thence through his land, on a certain creek, giving the courses and the distances of the lines, the direction of the curves, and their radii.[4] The Massachusetts statute is satisfied if location, as filed, identifies land, without the name of the owner being stated.[5] And under the Massachusetts statute, failure to deliver a plan of the land condemned does not invalidate the taking.[6] In proceedings for the condemnation of the land of one railway company by another, a motion to compel the latter to file plans, showing to what use the land is to be applied, should be granted, if the right to take the land, and the measure of damages therefor, would in this way be rendered more easy of determination.[7]

1 Ohio River R. R. Co. v. Harress, 24 W. Va. 511. For examples of descriptions held to be sufficient, see Satterly v. Winne, 101 N. Y. 213; Wentworth v. Milton, 46 N. H. 448; Acton v. York County 77 Me 128; Biddle v. Dancer, 20 N. J. 633: State v. Northrup, 18 N. J. 271; Smith v. Conway, 17 N. H. 586; In re Road in Sterrett Township, 114 Pa. St. 627; Bryant v. County Comm'rs, 79 Me. 128; Casey v. Kilgore, 14 Kan. 478; Sutherland v. Holmes, 78 Mo. 399; Collins v. Rupe, 109 Ind. 340; Road Case, 4 Yates, 514; Case of Road, 9 Serg. & R. 35; Westport v. County Comm'rs, 9 Allen, 203. For examples of descriptions held to be insufficient, see Farmer v. Pauley, 50 Ind. 583; Shute v. Decker, 51 Ind. 241; McDonald v. Wilson, 59 Ind. 54; Scraper v. Piper, 59 Ind. 158; Smith v. Weldon, 73 Ind. 454; Johns v. Marion County, 4 Or. 46; Canyonville etc. Road Co. v.

Douglas Co. 5 Or. 280; Clement v. Burnes, 43 N. H. 609; Indianapolis etc. R. R. Co. v. Newson, 54 Ind. 121; Null v. Zierle, 52 Mich. 540; Frost v. Leatherman, 55 Mich. 33; Mathias v. Drainage Comm'rs, 49 Mich. 465; Bennett v. Drainage Comm'rs, 56 Mich. 634; Fort Worth & Denver City R'y Co. v. Hogsett, 1 Tex. App. Civil Cas. p. 200; Midland R'y Co. v. Smith, 109 Ind. 488; Hayford v. County Comm'rs, 78 Me. 153; Toledo, Ann Arbor etc. R. R. Co. v. Munson, 57 Mich. 42.

2 Denver etc. R. R. Co. v. Canon City etc. R. R. Co. 99 U. S. 463; Duck River etc. R. R. Co. v. Cochrane, 3 Lea, 478; Drury v. Midland R. R. Co. 127 Mass. 571; Atchison etc. R. R. Co. v. Mecklin, 23 Kan. 167.

3 W. Va. Acts 1881, ch. 13, § 5.

4 Ohio River R. R. Co. v. Harress, 24 W. Va. 511.

5 Brock v. Old Colony etc. R. R. Co. 146 Mass. 194.

6 Abbott v. New York etc. R. R. Co. 145 Mass. 450.

7 Chicago & N. R'y Co. v. Chicago & E. R. R. Co. 112 Ill. 589.

§ 839. Evidence.—The tribunal has a large discretion as to the admission and exclusion of evidence.[1] When the proceedings are before a jury, they may be conducted without legal assistance. Liberal practice in the admission and exclusion of testimony is allowable; and the conclusions of the jury will not be disturbed unless manifestly inaccurate and substantially unjust.[2] When the proceedings are before commissioners, they must decide questions as to the admissibility of evidence, as well as regulate the order of proceedings before them; and unless a fair hearing is given to the parties, it is a good ground for rejecting their report.[3] In general, it may be said that the owner may prove such facts as he would naturally adduce if he were attempting a private sale.[4] But in estimating the value of the land, the person of the owner and the state of his business is not to be taken into consideration.[5] Where persons are shown to be familiar with the value of a particular piece of land across which a railroad has been built, they may testify as to the value of such tract immediately before the location of the road,

and to the value thereof immediately afterward.[6] And the witness may be asked how much less the land was worth after its appropriation, than before, exclusive of the resulting benefits.[7] In other words, what the property was worth without the improvement, and what it is worth with it, not considering general benefits—but he cannot be permitted to state the amount of damages thereby sustained by the land-owner, as that is a deduction to be made by the jury from the evidence.[8] The owner may be asked how much the presence of the railway has diminished the value of the land as held by him at the time of the trial, exclusive of the part taken.[9] Thus a mill-owner may testify as to the profits received from his mill in a year after the water was withdrawn.[10] In assessing damages evidence is admissible of a disclaimer by the lessor as to a portion of the land in an action of ejectment brought against him by a third party.[11] On a petition for the appointment of commissioners to ascertain the amount to be paid the city of New York for the construction of a railroad by the Metropolitan Transit Company, evidence on the part of the city was held admissible to show the inability of the company to build the road, and other circumstances to controvert its expressed intention to do so.[12] The court may limit the number of witnesses called to testify to any particular fact.[13]

1 Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381; Detroit etc. R. R. Co. v. Crane, 50 Mich. 182.

2 Michigan etc. R. R. Co. v. Barnes, 40 Mich. 383.

3 Central Pacific R. R. Co. v. Pearson, 35 Cal. 247; Washington R. R. Co. v. Switzer, 26 Gratt. (Va.) 661: Jones v. Goffstown, 39 N. H. 254; Hawley v. North Staffordshire R'y Co. 2 De Gex & S. 33.

4 Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381.

5 Pittsburg etc. R. R. Co. v. Robinson, 95 Pa. St. 426.

6 Blakeley v. Chicago etc. R. R. Co. 25 Neb. 207; Sioux City etc. R. R. Co. v. Weimer, 16 Neb. 272.

7 Britton v. Des Moines etc. R. R. Co. 59 Iowa, 540. See further upon the admissibility of evidence respecting the diminution of the value of land: Leavenworth etc. R. R. Co. v. Paul, 28 Kan. 816.

8 Omaha v. Kramer, 25 Neb 489.

9 Wooster v. Sugar River Valley R. R. Co. 57 Wis. 311.

10 Borough of Norwalk v. Blanchard, 56 Conn. 461.

11 Pennsylvania R. R. Co. v. Eby, 107 Pa. St. 166.

12 In re Metropolitan Transit Co's Petition, 111 N. Y. 588.

13 Union R. etc. Co. v. Moore, 80 Ind. 458; Everett v. Union Pacific R'y Co. 59 Iowa, 243; Sheldon v. Minneapolis etc. R'y Co. 29 Minn. 318.

§ 840. Admissibility of opinions of witnesses — The more recent cases hold that the question of the market value of land is not a question of skill or science upon which only experts are competent to testify. Persons living in the neighborhood, and acquainted with the value of the land, are generally allowed to testify as to the value, although not shown to be experts, strictly speaking.[1] And when a part only of the land is taken, the opinions of witnesses may be received as to the enhanced value of the residue, caused by the location of the road, or as to the extent of the damages consequent upon its appropriation.[2] But where persons not strictly experts are permitted to give their opinions as to the value or damage, it ought to be shown that they possess some special knowledge of the matter. A farmer cannot testify to the value of a fishing privilege, where it is not shown that he has any special knowledge of the matter.[3] In Indiana, opinion evidence is admissible as to the value of the land taken, while the damage to the residue cannot be proved by the opinions of witnesses; the facts and circumstances are to be stated to the jury, who are to draw inferences and estimate the

damages.[4] And in other States, also, it is held that a witness cannot give his opinion as to the amount of damages sustained,[5] while he may testify as to the value of the land before and after the taking, the conclusion of the jury then being arrived at by the mere arithmetical process of subtraction.[6] This seems to be a distinction without a difference.[7] The witness is not to be required to specify the effect of each particular element of damage, but may give his opinion in view of all combined.[8]

1 Pittsburgh etc. R. R. Co. v. Robinson, 95 Pa. St. 426; Sherman v. St. Paul etc. R. R. Co. 30 Minn. 229. Sioux City & P. R. R. Co. v. Weimer, 16 Neb. 272; Kansas Central R. R. Co. v. Allen, 24 Kan. 33, holding that a farmer familiar with the market value of land in the neighborhood may give his opinion as to the value of a farm before and after the taking; Curtis v. St. Paul etc. R. R. Co. 20 Minn. 23; Lehmicke v St. Paul etc. R. R. Co. 19 Minn. 461; Cleveland etc. R. R. Co. v. Ball, 5 Ohio St. 568; White Deer Creek L. Co. v. Sassaman, 67 Pa. St. 415; Pennsylvania etc. R. R. Co. v. Bunnell, 81 Pa. St. 414; Houston etc. R. R. Co. v. Knapp, 51 Tex. 592; Snyder v. Western etc. R. R. Co. 25 Wis. 60; Texas etc. R'y v. Kirby, 44 Ark. 103; Keithsburg etc. R. R. Co. v. Henry, 70 Ill. 230; Snow v. Boston etc. R. R. 65 Me. 230; Walker v. City of Boston, 8 Cush. 279; Inhabitants of West Newbury v. Chase, 5 Gray, 421; Shattuck v. Stoneham R. R. Co. 6 Allen, 115; Swan v. County of Middlesex, 101 Mass. 173; Simmons v. St. Paul etc. R'y Co. 18 Minn. 184; Mills on Eminent Domain, § 168; Lewis on Eminent Domain, § 435.

2 Texas & S. L. R'y Co. v. Kirby, 44 Ark. 103; Springfield & M. R'y Co. v. Rhea, 44 Ark. 258.

3 Boston etc. R. R. Co. v. Montgomery, 119 Mass. 114.

4 City of Logansport v. McMillen, 49 Ind. 493.

5 Brunswick etc. R. R. Co. v. McLaren, 47 Ga. 546.

6 Lewis on Eminent Domain, § 436.

7 Lewis on Eminent Domain, § 436; Rogers on Expert Testimony, § 152; Rochester & S. R. R. Co. v. Budlong, 10 How. Pr. 289, 293, where SELDEN, J. observes: "It is clear that in many cases the two questions are identical."

8 Wichita etc. R. R. Co. v. Kuhn, 33 Kan. 104, 675; In re New York, W. S. & B. R'y Co. 29 Hun, 609; In re Utica etc. R. R. Co. 56 Barb. 456.

§ 841. Admissibility of evidence as to sales of lands in the vicinity.—Sales of similar property in the same vicinity, made recently, are, it seems, generally admissible in evidence for the purpose of aiding in determining the market value of the land

taken for public uses.[1] In condemning an entire lot, evidence of the price per foot for which adjoining tracts have been sold is admissible in chief, but not, it is said, in rebuttal.[2] In Pennsylvania, the price paid in a particular instance in the neighborhood is not admissible, but only the general selling price in the vicinity.[3] The evidence should relate only to recent sales. The value of land sold in the vicinity ten or twelve years before, is inadmissible in evidence;[4] while testimony respecting the price for which other lands in the vicinity, sold after the location of the road, is not only admissible, but is declared to be of great weight.[5] It must be shown, however, that the neighboring land was similar in quality and location to the land in question.[6]

1 New York L. & W. R'y Co. v. Arnot, 27 Hun, 151; Paine v. City of Boston, 4 Allen, 168; Shattuck v. Stoneham etc. R. R. 6 Allen, 115; Sawyer v. Boston, 144 Mass. 470; Edmands v. Boston, 108 Mass. 535; *Moale v. Baltimore*, 5 Md. 314; 61 Am. Dec. 276; St. Louis etc. R. R. Co. v. Haller, 83 Ill. 208; Cherokee v. S. C. & I. F. etc. Co. 53 Iowa, 279; Concord R. R. Co. v. Greely, 23 N. H. 237; Mills on Eminent Domain, § 170; Washburn v Milwaukee etc. R. R. Co. 53 Wis. 354; Watson v. Milwaukee etc. R. R. Co. 57 Wis. 332. *Contra*, in Pennsylvania and Minnesota: Pittsburgh & W. R. R. Co. v. Patterson, 167 Pa. St. 461, 464; Pittsburg. V. & C. R'y Co. v. Vance, 115 Pa. St. 325; Stinson v. Chicago etc. R'y Co. 27 Minn. 284.

2 Chicago etc. R. R. Co. v. Maroney, 95 Ill. 179.

3 East Pa. R. R. Co. v. Hiester, 40 Pa. St. 53; Pittsburgh etc. R. R. Co. v. Rose, 74 Pa. St. 362; Pittsburgh & W. R. R. Co. v. Patterson, 167 Pa. St. 461, 464; Pittsburgh, V. & C. R'y Co. v. Vance, 115 Pa. St. 325.

4 Everett v. Union Pacific R. R. Co. 59 Iowa, 243.

5 Watson v. Milwaukee etc. R. R. Co. 57 Wis. 332.

6 Cummins v. Des Moines & S. L. R'y Co. 63 Iowa, 397; King v. Iowa etc. R. R. Co. 34 Iowa, 458.

§ 842. **Of the verdict or report.**—The verdict of the jury, or the commissioners' report, should contain a finding upon all the questions required by the statute to be passed upon, and the omission of any one of them will be sufficient ground for setting it aside.[1] It should show a substantial compliance

in all respects with the statute.[2] Especial care should be taken to set forth the facts upon which the jurisdiction of the tribunal depends.[3] The verdict or report should describe the land condemned. A report referring to the road as "located over, through, and upon" the land in question, and giving a plat and profile, which are filed according to statute, showing just where the road is located, sufficiently describes the property under the Missouri statute.[4] The finding need not specify the amount allowed for each item of injury. It is sufficient that it be in general terms. And in the absence of indications to the contrary, the presumption is, that all evident facts bearing on the amount of damages were duly considered.[5] Where a report of commissioners has been recommitted to them, and in their second report they declare the impossibility of setting forth minutely the constituent elements of damages, the report will be confirmed.[6] The finding of commissioners may be impeached, or the rule adopted by them in determining damages may be disclosed by their affidavits.[7] But an award of damages by commissioners, in proceedings for condemnation, is not invalidated by the fact that the amount was determined by taking an average of the sums fixed by them severally, there having been no arrangement to this effect made beforehand.[8]

1 United States v. Dumplin Island, 1 Barb. 24; O'Hara v. Pennsylvania R. R. Co. 25 Pa. St. 445; State v. Jersey City, 25 N. J. 309; Owen v. Jordan, 27 Ala. 608; Martin v. Rushton, 42 Ala. 289; Damrell v. Board of Supervisors, 49 Cal. 154; Pueblo etc. R. R. Co. v. Rudd, 5 Colo. 270; Windson v. Field, 1 Conn. 279; Bibb v. Mountjoy, 2 Bibb, 1; Neale v. Cogar, 1 Marsh. A. K. 589; Shackleford's Heirs v. Coffey, 4 Marsh. J. J. 40; Robinson v. Robinson, 1 Duval, 162; Bryant v. Glidden, 36 Me. 36; Pierce v. County Comm'rs, 63 Me. 252; Philadelphia etc. R. R. Co. v. Blake, 95 Pa. St. 139; In re New York etc. R'y Co. 35 Hun. 232; In re Opening 28th St. 11 Phila. 436.

2 Martin v. Rushton, 42 Ala. 289; State v Van Geisen, 15 N. J. 339; Griscom v. Gilmore, 15 N. J. 475; State v. Lord, 16 N. J. 149; State v Essex Public Road Board, 37 N. J. 273; Shaw v. Mills, 9 Cush. 503; In re Middle Creek Road, 9 Pa. St. 69.

3 State v. Scott, 9 N. J. 17; State v. Yauger, 29 N. J. 334; Thompson v. Multnomah Co. 2 Or. 34.

4 Kansas City etc. R. R. Co. v. Story, 96 Mo. 611. *Cf.* Mo Rev. Stat. § 894.

5 Michigan etc. R. R. Co. v. Barnes, 44 Mich. 222; S. C. 6 Am. & Eng. R. R. Cas. 608.

6 In re New York Elevated R. R. Co. 35 Hun, 414. *Cf.* Oregon R'y Co. v. Bridewell, 11 Or. 282.

7 Marquette, H. etc R. R. Co. v. Houghton County Probate Judge, 53 Mich. 217. See Kansas City etc. R. R. Co. v. Story, 93 Mo. 611, where evidence of commissioners appointed to assess damages for taking land for a railroad, that they lumped the damages, one of them saying that he put them at double the value of the land actually taken, was held to show that they had not pursued the proper method in estimating the amount.

8 Marquette, H. etc. R. R. Co. v. Houghton County Probate Judge, 53 Mich. 217.

§ 843. Of judgment and the order of confirmation.—The court will not readily disturb the verdict as being excessive, where there appears to be evidence upon which it might have been reasonably based.[1] And after a jury has duly settled the question of the taking and the compensation therefor, a judge cannot in an *ex parte* proceeding interfere therewith.[2] The order confirming the report of the commissioners should conform to the statute so far as it prescribes its form and contents.[3] It should be certain[4] and unconditional.[5] Where the company is already in possession, a judgment awarding damages should embrace an injunction in case the damages are not paid,[6] or direct that the company be ousted in case of non-payment.[7] In the absence of statutory provision, the judgment rendered upon the verdict of a jury, may be *in personam*, where the land has been appropriated by the company;[8] but a personal judgment should not be rendered where the property has not been entered

upon, and cannot be until compensation be made, and where the effect of the judgment is merely to fix a price at which the company may take the land if it elect so to do.[9] After lands have been condemned, the records of the court before which the proceedings were brought are conclusive as to the company's rights, and cannot be collaterally impeached;[10] a landowner, however, may question the validity of a location upon his own land.[11] It has been held in California that it is not necessary for the judgment in condemnation proceedings to be signed.[12] An adverse report by the commissioners under the New York statute[13] does not need to be confirmed by the court.[14]

1 Little Rock etc. R'y Co. v. Woodruff, 49 Ark. 381; Calumet River R. R. Co. v. Moore, 124 Ill. 329; Clark v. Chicago etc. R. R. Co. 23 Neb. 613; Covington etc. R. R. Co. v. Piel, 87 Ky. 267.

2 Toledo etc. R. R. Co. v. Dunlap, 47 Mich. 456.

3 Reynolds v. Reynolds, 15 Conn. 83; Indianapolis etc. R. R. Co. v. Smythe, 45 Ind. 322; Terre Haute etc. R. R. Co. v. Crawford, 100 Ind. 550; Snoddy v. County of Pettis, 45 Mo. 361; State v. Dover, 10 N. H. 304; State v. Cincinnati etc. R. R. Co. 17 Ohio St. 103; Fort Worth etc. R. R. Co. v. Lamphear, 1 Tex. App. Civil Cases, p. 127.

4 Portland etc. R. R. Co. v. County Comm'rs, 65 Me. 292; Yeamans v. County Comm'rs, 16 Gray, 36.

5 In re Road in Lathrop Township, 84 Pa. St. 126. But see Partridge v. Ballard, 2 Me. 50; In re Wharton St. 43 Pa. St, 487.

6 Chicago & Great Southern R'y Co. v. Jones, 103 Ind. 386.

7 Reed v. Chicago, M. & St. P. R'y Co. 23 Fed. Rep. 886.

8 Cook v. South Park Comm'rs, 61 Ill. 115; Rockford etc. R. R. Co. v. Coppinger, 63 Ill. 510; St. Louis etc. R'y Co. v. Teters, 63 Ill. 144; Peoria etc. R'y Co. v. Mitchell, 74 Ill. 394: Curtis v. St. Paul etc. R'y Co. 21 Minn. 497; Robbins v. St. Paul etc. R'y Co. 24 Minn. 191. But in Louisville etc. R. R. Co. v. Ryan, 64 Miss. 399, it was held improper to render a personal judgment, though the railroad was in possession, on the ground that the company might prefer to abandon the location and remain liable for the trespass: Lewis on Eminent Domain, § 533.

9 Peoria etc. R. R. Co. v. Peoria etc. R. R. Co. 66 Ill. 174: Springfield etc. R'y Co. v. Turner, 18 Ill. 187; Evansville etc. R. R. Co. v. Miller, 30 Ind. 209; St. Louis etc. R. R. Co. v. Wilder, 17 Kan. 239; Kansas City etc. R. R. Co. v. Merrill, 25 Kan. 421: Elizabethtown etc. R. R. Co. v. Thompson, 79 Ky. 52; Commonwealth v. Blue Hill Turnpike Co. 5 Mass. 420; Derby v. Gage, 60 Mich. 1; State v. Hug, 44 Mo. 116; Oregon R'y Co. v. Bridewell, 11 Or. 282; Chesapeake etc. R. R. Co. v. Bradford, 6 W. Va. 220; State v. Mills, 29 Wis. 322.

10 Galena etc. R. R. Co. v. Pound, 22 Ill. 399; Cleveland etc. R. R. Co.

v. Speer, 56 Pa. St. 325; Western Maryland R. R. Co. v. Patterson, 37 Md. 125; Cleveland etc. R. R. Co. v. Erie, 27 Pa. St. 380.

11 Wood's R'y Law, 761, 752; Newton v. Agricultural Branch R. R. Co. 13 Gray, 27; New York etc. R. R. Co. v. Boston etc. R. R. Co. 36 Conn. 196.

12 California Southern R. R. Co. v. Southern Pacific R. R. Co. 67 Cal. 59.

13 N. Y. Laws of 1884, ch. 252.

14 In re Nassau Cable Co. 36 Hun, 272.

§ 844. Of appeals and removal of causes.— "The practice in taking and perfecting appeals is regulated by statute, and the decisions present little of interest beyond the State in which they are made."[1] A statute appointing commissioners to condemn land, and making their award conclusive, has been held not to be unconstitutional.[2] An appeal from the award of the commissioners opens the whole case between the parties.[3] But when land is condemned as the property of one person, the company cannot, upon appeal from the award of damages, prove that it is the property of another without pleading the want of title.[4] If the amount of the award is increased upon appeal, the land-owner is entitled to interest upon the increase.[5] Tenants in common of land sought to be condemned are not entitled to separate trials. An appeal from the award to them must be from the gross amount.[6] And the railway company cannot appeal from the distribution of the gross amount of award among the owners of different estates in the land.[7] When a land-owner appeals from a judgment in condemnation proceedings, but retains the amount paid him, even if the judgment should be reversed, he will be held estopped by lapse of time from making any further claim.[8] The company may be authorized by statute to enter upon

lands while an appeal from the award is pending, upon giving bond for all damages that may be recovered.[9] The verdict will not be disturbed in any expropriation proceeding for the right of way, unless inconsistent with the proof in the record or unsupported by the evidence.[10] Where the testimony is conflicting, but there is some evidence to support the verdict, the appellate court will not reverse.[11] Where it is alleged, on an appeal from a commissioner's report assessing damages for land appropriated by a railroad company, that there is a defect in the minutes of testimony annexed to the report, in the absence of any charge of fraud, opportunity to correct the minutes should be granted to the commissioners.[12] After an appeal from an assessment of damages by viewers, under the General Railroad Law of Pennsylvania of Feb. 19, 1849, and a joinder of issue by agreement, and a verdict on the merits, and a new trial ordered, the appellant cannot withdraw the appeal without the consent of the opposite party, and have judgment on the report of the viewers.[13] A proceeding in the State court for the condemnation of a right of way for a railroad is within the purview of the Removal of Causes Acts, authorizing the removal of a suit of a civil nature at law or in equity, to the federal court.[14]

1 Lewis on Eminent Domain, § 537. Upon the proper form of appeal, see Spaulding v. Milwaukee etc. R. R. Co. 57 Wis. 304; S. C. 10 Am. & Eng. R. R. Cas. 509.

2 Central Branch Union Pacific R. R. Co. v. Atchison etc. R. R. Co. 23 Kan. 453. Upon the right of appeal in condemnation proceedings, see further, Wisconsin Central R. R. Co. v. Cornell University, 52 Wis. 537; 10 Am. & Eng. R. R. Cas. 108; Wyman v. Eastern R. R. Co. 75 Va. 780; 1 Am. & Eng. R. R. Cas. 22; Selma etc. R. R. Co. v. Gammage, 63 Ga. 604; 1 Am. & Eng. R. R. Cas. 41; St. Louis etc. R. R. Co. v. Quinn, 27 Kan. 370; S. C. 2 Am. & Eng. R. R. Cas. 646: Sherman v. St. Paul etc. R. R. Co. 30 Minn. 227; S. C. 10 Am. & Eng. R. R. Cas. 193; Cumberland etc. R. R. Co. v Penn.

sylvania etc. R. R. Co. 57 Md. 267; S. C. 10 Am. & Eng. R. R. Cas. 351; Brown v. Philadelphia etc. R. R. Co. 58 Md. 539; S. C. 10 Am. & Eng. R. R. Cas. 424; Beckwith v. Kansas City etc. R. R. Co. 28 Kan. 484; S. C. 10 Am. & Eng. R. R. Cas. 442; Denver etc. R. R. Co. v. Jackson, 6 Colo. 340; S. C. 10 Am. & Eng. R. R. Cas. 437; Cincinnati etc. R. R. Co. v. Bailey, 39 Ohio St. 170; S. C. 10 Am. & Eng. R. R. Cas. 513.

3 Wooster v. Sugar River Valley R. R. Co. 57 Wis. 311.

4 Deitricks v. Lincoln etc. R. R. Co. 13 Neb. 351; Gerrard v. Omaha etc R. R. Co. 14 Neb. 270.

5 Selma etc. R. R. Co. v. Gammage, 63 Ga. 604; Sioux City etc. R. R. Co. v. Brown, 13 Neb. 317.

6 Watson v. Milwaukee etc. R. R. Co. 57 Wis. 332. As to condemnation of lands held by a tenant for life, under the English Land Clauses Act, see In re Pigott, 13 Ch. Div. 145; 6 Am. & Eng. R. R Cas. 608.

7 Spaulding v. Milwaukee etc. R. R. Co. 57 Wis. 304.

8 St. Louis etc. R. R. Co. v. Karnes, 101 Ill. 402.

9 Central Branch Union Pacific R. R. Co. v. Atchison etc. R. R. Co. 28 Kan. 453.

10 New Orleans etc. R. R. Co. v. Frank, 39 La. An. 707.

11 Louisville etc. R. R. Co. v. Wunderlich, 61 Ind. 105.

12 In re New York, W. S. etc. R'y Co. 35 Hun, 260.

13 Schuylkill River E. S. R. R. Co. v. Harris, 124 Pa 215.

14 *Kansas City and T. R. R. Co. v. Interstate Lumber Co.* (C. C. W. D. Mo. 37 Fed. Rep. 3).

§ 845. Costs.—Ordinarily in condemnation proceedings, the costs are payable by the railway company,[1] even when upon an appeal brought by it, the amount of the award is reduced.[2] When, however, an appeal is granted to the defendant it is customary to provide that he shall pay the costs of the appeal if he fails to secure an increase over the amount of the original award,[3] together with interest thereon.[4] Under the New York code, condemnation cases are special proceedings, and the matter of costs is in the discretion of the court.[5] And where resistance to the application was made by a railway company for the purpose of preventing another railway from being constructed across its track, it was held proper that the costs should be cast upon the defendant.[6] When the compensation is settled by arbitration, the costs are pay-

able at once. Payment of them does not await the execution of the conveyance.[7]

1 Toledo etc. R'y Co. v. Dunlap, 47 Mich. 456, 464; Ulster & D. R. R. Co. v. Gross 31 Hun, 83.

2 *In re New York, W. S. & B. R. R. Co.* 94 N. Y. 287, 294; Schuylkill Navigation Co. v. Kittera, 2 Rawle, 438; Johnson v. Sutliff, 17 Neb. 423. *Contra*, Leak v. Selma etc. R. R. Co. 47 Ga. 345; Washburn v. Milwaukee etc. R. R. Co. 59 Wis. 364.

3 Leak v. Selma etc. R. R. Co. 47 Ga. 345; Atchison etc. R. R. Co. v. Lyon, 24 Kan. 745; Morse, Petitioner, 18 Pick. 443; First Baptist Society v. Fall River, 119 Mass. 95; Metler v. Easton etc. R. R. Co. 37 N. J. 222; Paris v. Coltraine, 3 Hawks (N. C.), 312.

4 First Baptist Society v. Fall River, 119 Mass. 95; Metler v. Easton etc. R. R. Co. 37 N. J. 222; Lewis on Eminent Domain, § 562.

5 Rensselaer etc. R. R. Co. v. Davis, 55 N. Y. 145; In re New York etc. R'y Co. 26 Hun, 592.

6 In re Cortland etc. R. R. Co. 98 N. Y. 336.

7 Capell v. Great Western R'y Co. 9 Q. B. Div. 459.

§ 846. Of the discontinuance of proceedings. If the purpose of making the proposed public work be abandoned, the finding of its value by the jury is ineffectual, and all that remains to be done is to compensate the property-owner for the damage inflicted on him by the inquest. But if the purpose, instead of being abandoned in good faith, is merely modified so as to enable the party exercising the right of eminent domain to take the chances of a verdict of another jury, the first proceedings are a bar to such a course, for the reason that any other rule would work injustice.[1] But the company may, after the assessment has been made, discontinue because of its being too high, and try another route, being in each instance liable for all the costs which their change of mind has occasioned, and this liability for costs is the only restraint upon them in this particular.[2] That section of the Illinois practice act forbidding the dismissal of an action except where a plea of set-

off has been interposed in an action on a contract does not apply in a proceeding in a condemnation of land for railroad purposes, and such proceeding may be dismissed by a petitioner at any time before rights become vested in the land-owner, the company having the right to abandon one route and select another.[3] Until the proceedings for condemnation have progressed so far as to give mutual rights to the parties, the company seeking to condemn the land has a discretion, and may refuse to proceed, but after rights have become vested thereunder, it cannot discontinue. When land has once been taken, and the company for any period of time has been seized and possessed thereof, or if the land-owner has had at any time a perfected right to the damages awarded by the commissioners, a subsequent change of intention on the part of the company will have no effect to defeat his claim for the damages which have been awarded to him.[4] When proceedings for condemnation have been abandoned by a railway company, pending an appeal, the company may institute proceedings for the same purpose a second time.[5]

1 Rogers v. City of St. Charles, 3 Mo. App. 41, 46; Neal v. Pittsburgh etc. R. R. Co. 31 Pa. St. 19; Stafford v. Mayor etc. of Albany, 7 Johns, 541.

2 Gear v. Dubuque etc. R. R. Co. 20 Iowa, 523; 89 Am. Dec. 550, and cases cited, *infra*. See, also, City of Chicago v. Barbian, 80 Ill. 482; State v. Graves, 19 Md. 351; Merrick v. Mayor of Baltimore, 43 Md. 219; Baltimore etc. R. R. Co. v. Nesbit, 10 How. (U. S.) 395.

3 Chicago etc. R. R. Co. v. Gates, 120 Ill. 86.

4 Stacey v. Vermont Central R. R. Co. 27 Vt. 39; First National Bank v. West River R. R. Co. 49 Vt. 167, 174; North Missouri R. R. Co. v. Lackland, 25 Mo. 532; Leisse v. St. Louis etc. R. R. Co. 2 Mo. App. 105; State v. Hug, 44 Mo. 116; Baltimore etc. R. R. Co. v. Nesbit, 10 How. 395; Lancaster v. Kennebec Co. 62 Me. 272; State v. Keokuk, 9 Iowa, 428; Wilkerson v. Buchanan Co. 12 Mo. 328; In re Military Parade Grounds, 60 N. Y. 319; Farmer v. Hookset, 28 N. H. 244; Blackshire v. Atchison etc. R. R.

Co. 13 Kan. 514; note to In re Water Commissioners of Jersey City, 86 Am. Dec. 199; S. C. 2 Vroom, 72.

5 Corbin v. Cedar Rapids, etc. R'y Co. 66 Iowa, 73.

§ 847. The same subject, continued—When the rights of the parties become vested.—The New York decisions are unanimous in holding that the exact point of time when these proceedings ripen into a right on the part of the land-owner to recover the damages assessed, is when the report of the commissioners is confirmed by the court. After the assessment has been made, but before it has been confirmed, the party seeking to condemn the land, may consider whether, at the sum assessed, it would be expedient to continue the work. If at the assessed value the private company should deem the enterprise unprofitable, or the public officers should deem it impolitic, it is to the interest of the former, and is the duty of the latter, to abandon the scheme, and discontinue the proceedings. It is incontestably established, that in proceedings to condemn private property for public use, the company may be permitted to discontinue proceedings at any time before rights resulting therefrom have become vested in the property owners, and that such rights are not vested until the report of the commissioners is finally confirmed, and there is a final award in the nature of a judgment in favor of the property owners for their compensation. After the confirmation of the report, the rights of the parties become conclusively established; both parties to the proceedings are bound.[1] The rule in Louisiana,[2] in Kentucky,[3] and in New Jersey, is the same as in New York.[4] In California, however, the rights of the parties are not fixed until compensation has

been made to the land-owner, or until the money has been deposited for his benefit. Accordingly, until then the condemnation may be abandoned at any time;[5] and the same is the rule in Illinois, Ohio, Kansas and Maryland.[6] In Colorado, the right to abandon proceedings for condemnation ceases when a right to compensation becomes vested in the land-owner, but it is not lost by a mere entry under the statute pending the proceedings, nor by taking an appeal.[7]

1 In re Washington Park, 56 N. Y. 144, 154; Martin v. Mayor of Brooklyn 1 Hill, 545; In re Canal Street, 11 Wend. 155; People v. Brooklyn, 1 Wend. 318; In re Rhinebeck R. R. 8 Hun, 34; Common Council of Brooklyn, 5 Hun, 175; In re Department of Parks, 73 N. Y. 560; Stafford v. Mayor of Albany, 7 Johns. 542; In re Dover Street, 18 Johns. 545; Hudson River R. R. Co. v. Outwater, 3 Sand. 689; In re Anthony Street, 20 Wend. 618; 32 Am. Dec. 608, and note; In re Military Parade Grounds, 60 N. Y. 319; Note to 86 Am. Dec. 202, 204.

2 Opening of Anthony Street, 20 Wend. 618; 32 Am. Dec. 608, and note; Application of Mayor of New Orleans, 4 Rob. (La.) 357.

3 Duncan v. Mayor of Louisville, 8 Dush, 68, 104.

4 *In re Water Commissioners*, 2 Vroom, 72; 86 Am. Dec. 199 (annotated); *Mabon v. Halstead*, 39 N. J. 640; O'Neil v. Freeholders of Hudson, 41 N. J. 161, 173.

5 Lamb v. Schottler, 54 Cal. 319, 327.

6 City of Bloomington v. Miller, 84 Ill. 621; Chicago v. Barbian, 80 Ill. 482; St. Louis etc. v. Teters, 68 Ill. 144; Blackshire v. Atchison etc. R. R. Co. 13 Kan. 514; State v. Cincinnati etc. R. R. Co. 17 Ohio St. 103; State v. Graves, 19 Md. 351, 370; Graff v. Mayor of Baltimore, 10 Md. 544.

7 Denver & N. O. R. R. Co. v. Lamborn, 8 Colo. 380.

§ 848. **Of the owner's remedies**—(*a*). **Under the statute.**—When the statute confers upon the company alone the right to institute proceedings, and it fails to do so, the owner must resort to the common-law remedies mentioned in the following sections, to restrain or redress the injury to his property, or to recover damages for its wrongful taking.[1] But legislation upon this subject generally provides a statutory remedy, under which the land-owner may take the initiative, either to procure an

assessment and award of compensation and damages where the company fails so to do, or to enforce the payment of the amount awarded him in the proceedings brought by the company, where it fails to make payment within a reasonable time.[2] The question arises with respect to these statutes, whether they are exclusive of the common-law remedies. It is generally held in jurisdictions where entry upon the land is allowable before compensation has been made, that the statutory remedy, if adequate, is exclusive of the remedies at common law. There are other cases, however, in the same jurisdictions which hold that the statutory remedy is cumulative.[3] So, also, in States in which compensation is required by law to be made before the company can enter upon the lands, it is well settled that the statutory remedy is cumulative only.[4]

1 *Vide infra*, §§ 849, 850, 851. See, also, Smith v. Chicago etc. R. R. Co. 67 Ill. 196; Atlantic v. Georgia R. R. Co. 48 Ga. 423; Bliss v. Chicago etc. R. R. Co. 42 Wis. 192; Kansas etc. R. R. Co. v. Streeter, 8 Kan. 135; Goulard v. St. Louis, 36 Mo. 352; Davis v. Russell, 47 Me. 443; Cairo etc. R. R. Co. v. Trout, 32 Ark. 17; Loop v. Chamberlain, 20 Wis. 135; Pettibone v. La Crosse etc. R. R. Co. 14 Wis. 443; Blesch v. Chicago etc. R. R. Co. 43 Wis. 183; Cushman v. Smith, 34 Me. 237; Gowen v. Penobscot R. R. Co. 44 Me. 140; Hall v. Pickering, 40 Me. 548; Eward v. Lawrenceburgh R. R. Co. 7 Ind. 711; Sherman v. Milwaukee etc. R. R. Co. 40 Wis. 645; Wood's Railway Law, 797.

2 Lewis on Eminent Domain, § 607; Furness v. Hudson River R. R. Co. 5 Sand. (N. Y.) 551; Selden v. Delaware & H. Canal Co. 29 N. Y. 634; Calking v. Baldwin, 4 Wend. (N. Y.) 667; 21 Am. Dec. 168; Dyer v. Tuscaloosa Bridge Co. 2 Porter, 296; 27 Am. Dec. 655; Kimble v. White Water etc. Canal Co. 1 Ind. 225; Smith v. Tripp, 14 R. I. 112; Perley v. Boston etc. R. R. Co. 57 N. H. 212; Orr v. Quimby, 54 N. H. 590; Exton v. Boston etc. R. R. Co. 51 N. H. 504; 12 Am. Rep. 147; Dearborn v. Boston etc. R. R. Co. 21 N. H. 179; Henniker v. Contoocook Valley R. R. Co. 29 N. H. 146; Clark v. Boston etc. R. R. Co. 24 N. H. 114; Trcy v. Cheshire R. R. Co. 23 N. H. 83; 55 Am. Dec. 177; Brown v. Beatty, 34 Miss. 227; 69 Am. Dec. 389; Fuller v. Edings, 11 Rich. (S. C.) 239; McLaughlin v. Charlotte etc. R. R. Co. 8 Rich. (S. C.) 583; Little Miami R. R. Co. v. Whiteacre, 8 Ohio St. 590; Hueston v. Eaton etc. R. R. Co. 4 Ohio St. 655; Philadelphia etc. R. R. Co. v. Yeiser, 8 Pa. St. 366; McKinney v. Monongahela Nav. Co. 14 Pa. St. 65; 53 Am. Dec. 517; Fehr v. Schuylkill Nav. Co. 69 Pa. St. 161; Philadelphia etc. R. R. Co. v. Williams, 54 Pa. St. 103; La Fayette etc. R. R. Co. v. Smith, 6 Ind. 249; New Albany etc. R. R. Co. v. Connelly, 7 Ind. 32; Cairo etc. R. R. Co. v. Turner, 31 Ark. 494; 25 Am. Rep. 564; Stodghill v. Chicago etc. R. R. Co. 43 Iowa, 26; 22 Am. Rep. 210; *Daniels v. Chicago*

etc. R. R. Co. 35 Iowa, 129; 14 Am. Rep. 490; McIntire v. Western North Carolina R. R. Co. 67 N. C. 278; Tennessee etc. R. R. Co. v. Adams, 3 Head (Tenn.), 596; Colcough v. Nashville etc. R. R. Co. 2 Head (Tenn.), 171; Sabin v. Vermont Central R. R. Co. 22 Vt. 363; Vermont Central R. R. Co. v. Baxter, 22 Vt. 365; Mason v. Kennebec etc. R. R. Co. 31 Me. 215; Boothbay v. Androscoggin etc. R. R. Co. 51 Me. 312; Gowen v. Penobscot etc. R. R. Co. 44 Me. 140; McCormack v. Terre Haute etc. R. R. Co. 8 Ind. 285; Mill v. Whitewater etc. Canal Co. 4 Ind. 431; Lewiston v. Junction R. R. Co. 7 Ind. 597; Pettibone v. La Crosse etc. R. R. Co. 14 Wis. 443; Sherman v. Milwaukee etc. R. R. Co. 40 Wis. 645; Kennedy v. Milwaukee etc. R. R. Co. 22 Wis. 581; Ford v. Chicago etc. R. R. Co. 14 Wis. 609; 80 Am. Dec. 791; Stowell v. Flagg, 11 Mass. 364; Perry v. Worcester, 6 Gray, (Mass.) 544; 53 Am. Dec. 431; Stevens v. Middlesex Canal Co. 12 Mass. 466; Mellen v. Western R. R. Co. 4 Gray (Mass.), 301; *Aldrich v. Cheshire R. R. Co.* 21 N. H. 359; 53 Am. Dec; 212. Wood v. Nashua Manuf. Co. 4 N. H. 527; *La Fayette Plank Road v. New Albany etc. R. R. Co.* 13 Ind. 90; 74 Am. Dec. 246; Indiana etc. R. R. Co. v. Oaks, 20 Ind. 9; Green v. Boody, 21 Ind. 10; Teick v. Carver County, 11 Minn. 292; Lindell v. Hannibal etc. R. R. Co. 36 Mo. 543; Clark v. Hannibal etc. R. R. Co. 36 Mo. 202; Koch v. Williamsport Water Co. 65 Pa. St. 288; Cumberland Valley R. R. Co. v. McLanahan, 59 Pa. St. 23; Johnson v. St. Louis etc. R'y Co. 32 Ark. 758; International etc. R. R. Co. v. Benitos, 59 Tex. 326; 10 Am. & Eng. R. R. Cas. 122. *Contra*, Atlantic & G. R. R. Co. v. Fuller, 48 Ga. 423; Doe v. Georgia R. & Banking Co. 1 Ga. 524.

3 Toney v. Johnson, 26 Ind. 382: Lane v. Miller, 22 Ind. 104; Davis v. Russell, 47 Me. 443; Nichols v. Somerset & K. R. R. Co. 43 Me. 356.

4 Parker v. East Tennessee etc. R. R. Co. 13 Lea, 669.

§ 849. (*b*). **By injunction.**—If the statute require that an effort shall be made to purchase the right of way,[1] or that the damages awarded shall be paid or tendered to the owner,[2] or that a deposit shall be made to secure the payment,[3] or that the line shall be surveyed, and a description of the route filed with the secretary of State,[4] or that the company shall erect fences;[5] or if the statute authorize the taking of private property, without providing for the making of compensation,[6] the owner is entitled to an injunction restraining the company from entering upon his land, or constructing its road, until the statutory requirements have been fulfilled. But an injunction will not issue upon an allegation that the company has no power under its charter to take land by condemnation. In such a case, the owner should object to the con-

firmation of the inquisition.[7] Nor will the writ be granted to restrain one railway company from building upon a route abandoned by another.[8]

1 Reitenbaugh v. Chester Valley R. R. Co. 21 Pa. St. 100.

2 *Story v. New York Elevated R. R. Co.* 90 N. Y. 122; 43 Am. Rep. 146; Chambers v. Cincinnati etc. R. R. Co. 69 Ga. 320; Gammage v. Georgia Southern R. R. Co. 65 Ga. 614; Pittsburg etc. R. R. Co. v. Bruce, 102 Pa. St. 23; Starr v. Camden & A. R. R. Co. 24 N. J. 592; Stacey v. Vermont Central R. R. Co. 25 Vt. 39; Dimmick v. Council Bluffs etc. R. R. Co. 58 Iowa, 637.

3 Bensley v. Mountain Lake etc. Co. 13 Cal. 346; 73 Am. Dec. 575. In Briggs v. Cape Cod Ship Canal Co. 137 Mass. 71, it was held that when the statute does not expressly require the deposit to be made in money, a deposit of United States bonds is sufficient.

4 Morris & E. R. R. Co. v. Blair, 9 N. J. Eq. 635.

5 Spencer v. Falls Turnpike Co. (Md. 1889), 19 Md. Law J. 950, where, however, it was held that the railroad, having been permitted to build its road without objection, would not be restrained six years thereafter from operating its line.

6 Brewer v. Bowman, 9 Ga. 37; Watson v. Trustees etc. 21 Ohio St. 667; Piscataqua Bridge Co. v. New Hampshire Bridge Co. 7 N. H. 35; Ex parte Martin, 13 Ark. 198; 58 Am. Dec. 321; Trenton Water P. Co. v. Raff, 36 N. J. 335. *Cf.* Williams v. N. Y. Central R. R. Co. 16 N. Y. 97; 69 Am. Dec. 651; Broiestedt v. South Side R. R. Co. 55 N. Y. 220; Carpenter v. Oswego etc. R. R. 24 N. Y. 655; Mahan v. New York Central R. R. Co. 24 N. Y. 658; Wager v. The Troy Union R. R. 25 N. Y. 526.

7 Cumberland etc. R. R. Co. v. Pennsylvania etc. R. R. Co. 57 Md. 267

8 Troy etc. R. R. Co. v. Boston etc. R. R. Co. 86 N. Y. 107.

§ 850. (c). **In ejectment.**—If the company takes possession of the property without having pursued all the provisions required by law for its legal appropriation, the land-owner may bring ejectment.[1] Or if, having instituted condemnation proceedings, the company prematurely enters upon the land before an order from the court authorizing it so to do, the owner may upon motion be reinstated by the court.[2] It is no defense to an action in ejectment that the company had mortgaged the land, where there is no proof that the plaintiff knew of the execution of the mortgage.[3]

1 Bradley v. Missouri etc. R. R. Co. 91 Mo. 493.

2 In re Bryan, 62 Cal. 375.

3 Bradley v. Missouri etc. R. R. Co. 91 Mo. 493.

§ 851. *(d).* **In trespass.**—Trespass will lie for an unlawful entry upon the land under color of the power of eminent domain;[1] as where entry is made under a statute which does not confer the authority;[2] or under a statute making no provision for compensation.[3] Even when entry may be lawfully made before payment, if the compensation be not made within a reasonable time, the company will be deemed a trespasser *ab initio.*[4] An action in trespass is the proper remedy, also, when injury has been done by the company to lands beyond its right of way.[5] This is upon the ground that the original award does not cover injuries resulting from the improper or negligent construction or operation of the road.[6] Accordingly, in jurisdictions which admit such elements of damage to be considered in estimating the original award, a separate action for the trespass will not lie.[7]

1 Thatcher v. Dartmouth Bridge Co. 18 Pick. 501; Schmidt v. Densmore, 42 Mo. 225.

2 Whitehead v. Arkansas Central R. R. Co. 28 Ark. 460; Potter v. Ames, 43 Cal. 75; Alexander v. District of Columbia, 3 Mackey (D. C.) 192; Capers v. Augusta G. & S. R. R. Co. 76 Ga. 90; Taylor v. Marcy, 25 Ill. 518; Crawfordsville R. R. Co. v. Wright, 5 Ind. 252; Anderson etc. R. R. Co. v. Kerndole, 54 Ind. 314; Wilson v. Lynn, 119 Mass. 174; Wamesit Power Co. v. Allen, 120 Mass. 352; Warren v. Spencer Water Co. 143 Mass. 9; Prescott v. Patterson, 44 Mich. 525; Hursh v. First Div. of St. Paul etc. R. R. Co. 17 Minn. 439; Schroeder v. De Graff, 28 Minn. 299; Memphis etc. R. R. Co. v. Payne, 37 Miss. 700; Mueller v. St. Louis etc. R. R. Co. 31 Mo. 262; Republican Valley R. R. Co. v. Fink, 18 Neb. 82; Board of Comm'rs v. Miller, 82 Ind. 572; Henry v. Dubuque etc. R. R. Co. 10 Iowa, 540; Birge v. Chicago etc. R'y Co. 615 Iowa, 440; Atchison etc. R'y Co. v. Weaver, 10 Kan. 344; Harlow v. Pike, 3 Me. 438; Storer v. Hobbs, 52 Me. 144; Baltimore etc. R. R. Co. v. Boyd, 3 Md. 325; Kean v. Stetson, 5 Pick. 492; Inhabitants of the Eighth School District v. Copeland, 2 Gray, 414; Secomb v. Milwaukee etc. R. R. Co. 49 How. Pr. 75; Pennsylvania R. R. Co. v. Eby, 107 Pa. St. 166; Buffalo Bayou etc. R. R. Co. v. Ferris, 26 Tex. 588; Ramsden v. Manchester etc. R'y Co. 1 Ex. 723; Goldie v. Oswald, 2 Dow, 534.

3 Cogswell v. Essex Mill Co. 6 Pick. 94; Seneca R. R. Co. v. Auburn etc. R. R. Co. 5 Hill, 170; Comins v. Bradbury, 10 Me. 447; Trenton Water Power Co. v. Raff, 36 N. J. 335; Williamson v. Canal Co. 78 N. C. 156.

4 Cushman v. Smith, 34 Me. 247; Davis v. Russell, 47 Me. 443. But see Turrell v. Norman, 19 Barb. 262; Louisville etc. R. R. Co. v. Quinn, 14 Lea, 65.

5 Doud v. Mason City etc. R. R. Co. 76 Iowa, 453; St. Peter v. Denison

53 N. Y. 416; 17 Am. Rep. 258; Hay v. Cohoes Co. 2 N. Y. 159; 51 Am. Dec. 273; Tremain v. Cohoes Co. 2 N. Y. 163; 51 Am. Dec. 184; Carmen v. Indiana etc. R. R. Co. 4 Ohio St. 399.

6 *Vide supra*, § 826.

7 Sabin v. Vermont Central R. R. Co. 23 Vt. 363; Dodge v. County Comm'rs of Essex, 3 Met. 380; Brown v. Providence etc. R. R. Co. 5 Gray, 35; Whitehouse v. Androscoggin R. R. Co. 52 Me. 208; Tibbetts v. Knox etc. R. R. Co. 62 Me. 437; Eaton v. European etc. R. R. Co. 59 Me. 520; 8 Am. Rep. 430.

§ 852. **Laches—Limitations.**—If the owner of land wrongfully taken by a railway company make no objection to its appropriation until after the location and construction of the road, he cannot maintain ejectment,[1] nor obtain an injunction restraining the further operation of the road,[2] nor maintain trespass for the wrongful taking,[3] nor recover exemplary damages.[4] After such acquiescence on his part, he can recover only the fair market value of the land.[5] His right to this is not lost by mere acquiescence in the location and construction of the road.[6] It may be barred, however, by a statute of limitations. Statutes imposing reasonable limitations upon the time for bringing actions for the recovery of compensation for the taking of private property, are held not to be in contravention of the constitutional guaranty that compensation shall be made in such cases.[7] And a requirement in the charter of a railway company, that all claims for damages for land appropriated by the company must be made within a certain time, operates as a positive statute of limitations, so as to bar all claims not made within the prescribed time, when the parties are *sui juris*.[8]

1 Louisville etc. R. R. Co. v. Soltweddle (1889), 116 Ind. 257.

2 Spencer v. Falls Turnpike Co. Md. 19 Md. Law J. 950. Abbott v New York etc. R. R. Co. 145 Mass. 450; Milwaukee & N. R. R. Co. v. Strange, 63 Wis. 178.

3 Milwaukee & N. R. R. Co. v. Strange, 63 Wis. 178.

4 Baltimore etc. R. R. Co. v. Boyd, 67 Md. 32.

5 Milwaukee & N. R. R. Co. v. Strange, 63 Wis. 178. *Cf.* Baltimore etc. R. R. Co v. Boyd, 67 Md. 32.

6 Allen v. Wabash & St. L. R'y Co. 84 Mo. 646; Thornton v. Sheffield etc. R. R. Co. 84 Ala. 109. *Cf.* Chicago etc. R. R. Co. v. Estes, 72 Iowa, 235; Cincinnati etc. R. R. Co. v. Clifford, 113 Ind. 460; Campbell v. Indianopolis R. R. Co 110 Ind. 409.

7 Rexford v. Knight, 11 N. Y. 308; Carolina Central R. R. Co. v. McCaskill, 94 N. C. 745; Taylor v. Marcy, 25 Ill. 518; Harper v. Richardson, 22 Cal. 251; Cupp v. Comm'rs of Seneca, 19 Ohio St. 173; Simms v. Memphis etc. R. R. Co. 12 Heisk. (Tenn.) 621, 623; Cooley on Constitutional Limitations, 501; Reckner v. Warner, 22 Ohio St. 275; Shearer v. Comm'rs of Douglas County, 13 Kan. 145. *Cf.* Hendrick v. Carolina Central R. R. Co. 101 N. C. 617.

8 Carolina Central R. R. Co. v. McCaskill, 94 N. C. 746

PART IV.

THE RAILWAY AS A COMMON CARRIER.

CHAPTER XXXIII.

CARRIERS OF PASSENGERS.

§ 853. Common carriers defined.
§ 854. Of the obligation to receive and carry—Exceptions.
§ 855. Of discrimination against individuals.
§ 856. How the relation of carrier and passenger arises.
§ 857. Whether persons on freight trains, locomotives, etc., are passengers.
§ 858. Whether persons upon trains for special purposes are passengers.
§ 859. When the relation of carrier and passenger arises and terminates.
§ 860. The passenger's obligations—Observance of rules and regulations.
§ 861. The same subject, continued—Passengers upon freight trains.
§ 862. Of the obligation to warn passengers of danger and supply necessary information.
§ 863. Of the obligation to furnish seats.
§ 864. Of the obligation to treat the sick and infirm humanely.
§ 865. Of the obligation to carry upon schedule time.
§ 866. Of the obligation to allow time for boarding and alighting.
§ 867. Of the obligation to carry to destination.
§ 868. The same subject, continued—Express trains and local travel.

§ 853. Common carriers defined.—Natural persons or corporations engaged in the business of transporting passengers or freight over railways operated by them, are common carriers, and as such are entitled to the rights and subject to the liabilities which pertain by law to persons engaged in a like public employment.[1] For a common carrier is one who undertakes, for hire or reward, to transport the persons or goods of *such as choose to employ him*, from place to place.[2] Mr. Hutchinson defines a common or public carrier to be one, "who undertakes as a business, for hire or reward, to carry

from one place to another, the goods of all persons who may apply for such carriage, provided the goods be of the kind which he professes to carry, and the person so applying will agree to have them carried upon the lawful terms prescribed by the carrier, and who, if he refuses to carry such goods for those who are willing to comply with his terms, becomes liable to an action by the aggrieved party for such refusal."[3] Thus, it appears that "the obligation by law to carry is essential to constitute the vocation of the common carrier, and the liability to an action for a refusal to carry is, perhaps, the safest criterion of the character of the carrier."[4] So that where a corporation, which is under no legal obligation to do so, voluntarily contracts to switch cars over its tracks, between two or more railways, for which service it collects a certain switching charge whether the cars be loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars, such corporation, in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman.[5]

1 Davis v. Button, 78 Cal. 247; Weed v. Saratoga R. R. Co. 19 Wend. 534; *Camden R. R. Co. v. Burke*, 13 Wend. 611; S. C. 28 Am. Dec. 488; Dill v. South Carolina R. R. Co. 7 Rich. 158; 62 Am. Dec. 407; Palmer v. Grand Junction R. R. Co. 4 Mees. & W. 749; Muschamp v. Lancaster R. R. Co. 8 Mees. & W. 421; Jones v. The Railroad, 5 Green C. E. 379; Noyes v. The Railroad, 27 Vt. 110; Contra Costa Steam Nav. Co. v. Moss, 23 Cal. 323; East Tennessee etc. R. R. Co. v. Nelson, 1 Cold. 272; Root v. The Railroad, 45 N. Y. 524; *Thomas v. Boston etc. R. R. Co.* 10 Metc. 472; S. C. 43 Am. Dec. 444; Fuller v. Naugatuck R. R. Co. 21 Conn. 570; Parker v. Great Western R. R. Co. 7 Man. & G. 253; Eagle v. White, 6 Whart. 505; 37 Am. Dec. 434.

2 *Dwight v. Brewster*, 1 Pick. 50; S. C. 11 Am. Dec. 133; Alexander v. Greer, 7 Hill, 544; *Sheldon v. Robinson*, 7 N. H. 157; S. C. 26 Am. Dec. 726; Elkins v. Boston etc. R. R. Co 3 Foster, 275; Blanchard v. Isaacs, 3 Barb. 388; Samms v. Stewart, 20 Ohio, 71; 55 Am. Dec. 445; Tunnel v. Pettijohn, 2 Harr. (Del.) 48; Fuller v. Bradley, 25 Pa. St. 120; Verner v. Sweitzer, 32 Pa. St. 212; *Doty v. Strong*, 1 Pinney, 313; S. C. 40 Am. Dec. 773.

3 Hutchinson on Carriers, § 47.

4 Fish v. Chapman, 2 Ga. 49; 46 Am. Dec. 393; per NESBIT, J.

5 *Kentucky and I. Bridge Co. v. Louisville & N. R. R. Co.* (1888) 37 Fed. Rep. 567.

§ 854. Of the obligation to receive and carry—Exceptions.—A common carrier is bound to receive and carry all persons who apply for transportation as long as it has room to accommodate them, unless there be some legal ground of refusal.[1] And the want of accommodations is no excuse for the rejection of a passenger holding a ticket limited to a certain train or good "for this day only."[2] The carrier may, however, legally refuse to transport drunken persons,[3] or a person with an infectious or loathsome disease,[4] or gamblers who ply their illegal business upon the train,[5] or one who seeks to canvass for a rival line.[6] And it is under no obligation to receive a person who has just been lawfully ejected from its train.[7]

1 Saltonstall v. Stokes, 13 Pet. 181; Hannibal etc. R. R. Co. v. Swift, 12 Wall. 263; Jenks v. Coleman, 2 Sum. 221; *Bennett v. Dutton*, (1839) 10 N. H. 481; Turner v. North Beach etc. R. R. Co. 34 Cal. 594; Pleasant v. North Beach etc. R. R. Co. 34 Cal. 586; Tarbell v. Central Pacific R. R. Co. 34 Cal. 616; Freeman v. Detroit, M. & M. R. R. Co. (1887) 65 Mich. 577, where a train failed to stop at a flag-station upon the customary signal being given, and the plaintiff was allowed to recover the penalty prescribed by Mich. Stat. (How.) § 3324, for failure to "furnish accommodation"; Thompson on Carriers, 2; Wood's Railway Law, 1034. *Cf. Bennett v. Peninsula & Oriental Steamboat Co.* (1848) 6 Com. B. 775; S. C. 16 Com. B. 28; S. C. Thompson on Carriers, 448.

2 Hawcroft v. Great Northern R'y Co. 16 Jur. 196.

3 *Vinton v. Middlesex R. R. Co.* (1865) 11 Allen, 304; 87 Am. Dec. 714; S. C. Thompson on Carriers, 6. But slight intoxication is not sufficient cause for rejection: *Pittsburg etc. R. R. Co. v. Vandyne*, 57 Ind. 576; 26 Am. Rep. 68.

4 *Walsh v. Chicago etc. R. R. Co.* 42 Wis. 23; 24 Am. Rep. 376.

5 *Thurston v. Union Pacific R. R. Co.* (1877) 4 Dill. 321; S. C. Thompson on Carriers, 10.

6 *Jencks v. Coleman*, (1835) 2 Sum. 221; S. C. Thompson on Carriers, 11.

7 *O'Brien v. Boston & Worcester R. R. Co.* (1860) 15 Gray, 20; 77 Am. Dec. 347; S. C. Thompson on Carriers, 22.

§ 855. Of discrimination against individuals. A railway company, as a common carrier of persons, cannot discriminate against individuals of the same class, either by way of furnishing some of them inferior accommodations,[1] or by way of charging them more than the regular fare;[2] but carrying certain persons without any direct pecuniary compensation, or for less than the regular fare, when there are especial reasons for doing so, is not regarded as a discrimination against those paying the regular fare, if the latter be in itself a reasonable charge.[3] Neither is a classification of passengers according to sex or race such a discrimination against individuals as will constitute a cause of action against a company excluding men from cars reserved for women,[4] or negroes from seats[5] or cars reserved for Caucasians.[6] But the cars set apart for negroes must be equally safe and comfortable as those provided for other passengers paying the same rate of fare.[7] Whether a contract between a railway company and a line of steamers under which the agents of the latter alone were to be permitted to solicit business upon the cars of the former, is an oppressive monopoly, is a mixed question of law and fact.[8]

1 Houck v. Southern Pacific R'y Co. (1889), 38 Fed. Rep. 226, annotated.

2 *Vide infra*, § 942.

3 Spofford v. Boston & M. R. R. Co. 128 Mass. 326. *Acc. Johnson v. Pensacola etc. R. R. Co.* 16 Fla. 623; 26 Am. Rep. 731: *Messenger v. Pennsylvania R. R. Co.* 37 N. J. 531; 18 Am. Rep. 754; 36 N. J. 407; 13 Am. Rep 457; *New England Express Co. v. Maine Cent. R. R. Co.* 57 Me. 188; 2 Am. Rep. 31; *McDuffee v. Portland etc. R. R. Co.* 52 N. H. 430; 18 Am. Rep. 72.

4 Peck v. New York Central R. R. Co. 70 N. Y. 587; *Bass v. Chicago etc. R. R. Co.* 42 Wis. 654; S. C. 39 Wis. 636; S. C. 36 Wis. 450; 24 Am. Rep. 437; S. C. Thompson on Carriers, 311.

5 Westchester etc. R. R. Co. v. Miles, 55 Pa. St. 209; 93 Am. Dec. 744.

6 Houck v. Southern Pacific R'y Co. (1889), 38 Fed. Rep. 226, annotated; Britton v. Atlantic etc. R. R. Co 88 N. C. 536; 43 Am. Rep. 749; Chesapeake, O. & S. W. R. R. Co. v. Wells (1887); 85 Tenn. 613.

7 Houck v. Southern Pacific R'y Co. (1889); 38 Fed. Rep. 226, annotated.

8 South Florida R. R. Co. v. Rhoads (Fla. 1889), 37 Eng. & Am. R. R. Cas. 100.

§ 856. How the relation of carrier and passenger arises.—Ordinarily a person becomes a passenger by entering the depot or cars of a railway, in good faith intending to obtain transportation from one regular stopping-place to another, subject to all reasonable rules and regulations of the company. Accordingly, the relation of carrier and passenger does not exist between a railway company and persons who seek to defraud it,[1] nor who board a train with no intention of paying, merely to ride a short distance and then jump off;[2] nor who ride upon the locomotive without the conductor's permission;[3] nor who refuse to sign a reasonable contract upon their tickets;[4] nor who attempt to travel upon a forged ticket or pass,[5] or upon one obtained by fraud,[6] or upon a non-transferable pass issued to another person.[7] But if a person who was not the original purchaser of a non-transferable commutation ticket, presents it in good faith, without any attempt to conceal his identity, and is thereupon carried as a passenger, the company is under obligation to carry him safely and to afford him a safe place to alight and leave the road.[8] So, also, a person is none the less a passenger and entitled to the protection of the carrier and the rights and privileges of a passenger, because of having taken a wrong train through mistake,[9] or because of having entered the car at a stopping-place where no depot was maintained,[10] or because of be-

ing carried without any direct pecuniary compensation.[11]

1 Toledo etc. R. R. Co. v. Brooks, 81 Ill. 245; *Highley v. Gilmer*, 3 Mont. 90; 35 Am. Rep. 450.

2 Muehlhausen v. St. Louis R. R. Co. (1887) 91 Mo. 332. *Cf.* Ecliff v. Wabash, St. L. & P. R'y Co. (1887) 64 Mich. 196, where a boy stealing a ride on the front of the locomotive was killed in a collision in which no one else was injured, and damages were refused on the ground of contributory negligence.

3 Chicago etc. R. R. Co. v. Michie, 83 Ill. 427.

4 Elliott v. Western etc. R. R. Co. 58 Ga. 454.

5 Toledo etc. R. R. Co. v. Brooks, 81 Ill. 245.

6 Brown v. Missouri etc. R. R. Co. 64 Mo. 536; Louisville, N. A. & C. R'y Co. v. Thompson, (1887) 107 Ind. 442, where, however, it was held that the burden of proof is upon the company to show that the pass was fraudulent.

7 *Toledo etc. R. R. Co. v. Beggs*, 85 Ill. 80; 28 Am. Rep. 613. *Cf.* Way v. Chicago R. & P. R'y Co. (1888) 73 Iowa, 463, where it was held that the company would be liable for *gross* negligence toward one using a non-transferable pass.

8 Robostelli v. New York, N. H. & H. R. Co. (1888) 33 Fed. Rep. 796.

9 Cincinnati, H. & I. R. R. Co. v. Carper (1888), 112 Ind. 26; Columbus etc. R. R. Co. v. Powell, 40 Ind. 37.

10 Dewire v. Boston & M. R. R. Co. 148 Mass. 343.

11 Railway Co. v. Stevens, 95 U. S. 655; *Philadelphia etc. R. R. Co. v. Derby*, (1852) 14 How. 468; S. C. Thompson on Carriers, 31; Camden & A. R. R. Co. v. Bausch, (Pa. 1887); 6 Cent. Rep. 121; Indianapolis etc. R. R. Co. v. Beaver, 41 Ind. 497; Youmans v. Contra Costa Steam Nav. Co. 44 Cal. 71; Ohio etc. R. R. Co. v. Selby, 47 Ind. 471; 17 Am. Rep. 719; *Cleveland etc. R. R. Co. v. Curran*, 19 Ohio St. 1; 2 Am. Rep. 362. *Vide infra*, § 959.

§ 857. Whether persons on freight trains, locomotives, et cetera, are passengers.—Whether one who travels upon a locomotive,[1] or upon a car or train not operated for the carriage of persons, not knowing it to be against the rules of the company, bears the relation of passenger to the carrier, depends upon whether he does so at the direction, or with the consent, of an agent or servant of the company, who, by the scope of his employment, apparently has authority to permit it.[2] While in an action against a railway company for an injury sustained by being thrown from a hand-car on which

the person injured was riding at the invitation of an employee, the evidence being irreconcilable as to the authority of the latter, it has been held error to instruct the jury on the hypothesis that the employee was empowered to give the consent of the company in such a case;[3] yet on the other hand, the jury cannot be instructed as a matter of law, that a person riding upon a locomotive at the invitation or direction of the engineer is not entitled to the rights of a passenger.[4] Neither can a passenger, having no notice of a regulation prohibiting persons to ride upon locomotives, be expected to stop and inquire as to the extent of the engineer's authority to invite or direct him to travel in that manner.[5] The same rule applies to a person riding with the conductor's consent upon construction,[6] freight,[7] or special trains.[8] It has been said to be immaterial in such cases whether the passage was for hire or gratuitous.[9] In a recent case it was held, that although a train, which ran regularly on week-days as a mixed freight and passenger train, was running specially on Sunday, in charge of the usual conductor, and deceased could not of right have demanded to be carried as a passenger on that day, and neither paid nor was asked to pay fare, yet if the company, through its conductor, permitted deceased to ride, it assumed the same duties toward him as if he had been a regular passenger thereon.[10]

1 Lake Shore & M. S. R. R. Co. v. Brown (1887), 123 Ill. 162.

2 McGee v. Missouri Pacific R'y Co. 92 Mo. 208; International & G. N. R. R. Co. v. Cock (1887), 68 Tex. 713; Wagner v. Missouri Pacific R'y Co. 97 Mo. 512; St. Joseph & W. R. R. Co. v. Wheeler, 35 Kan. 185.

3 International & G. N. R. R. Co. v. Cock (1887), 68 Tex. 713.

4 Lake Shore & M. S. R. R. Co. v. Brown (1887), 123 Ill. 162.

5 Lake Shore & M. S. R. R. Co. v. Brown (1887), 123 Ill. 162.

6 St. Joseph & W. R. R. Co. v. Wheeler, 35 Kan. 185.

7 International & G. N. R. R. Co. v. Irvine, 64 Tex. 529; McGee v. Missouri Pacific R'y Co. (1887) 92 Mo. 208.

8 Wagner v. Missouri Pacific R'y Co. 97 Mo. 512.

9 Wagner v. Missouri Pacific R'y Co. 97 Mo. 512. *Contra, Gardner v. New Haven & N. R. R. Co.* 51 Conn. 143; 50 Am. Rep. 12.

10 Wagner v. Missouri Pacific R'y Co. 97 Mo. 512; RAY, C. J., and SHERWOOD J., dissenting.

§ 858. Whether persons upon trains for special purposes are passengers.—Persons who enter or are carried upon railway trains for special purposes other than the service of the company or ordinary travel, are entitled to the same care and protection as passengers, so far as the circumstances of the case permit, provided their presence upon the train be lawful and duly authorized. Thus, the company owes the same duties to one who boards a train to assist in carrying an invalid passenger, while he is rendering the assistance and while leaving the train, as it owes to passengers themselves.[1] So, also, the purpose of supplying with ice-water is a sufficient consideration to entitle a person to the rights of a passenger.[2] An express agent, also, is held to be a passenger and entitled to be carried safely.[3] But due allowance is to be made in favor of the company, by reason of the risk necessarily incident to his employment requiring him to ride in the baggage-car.[4] And the company may, by contract, be absolved from liability for injuries resulting to him therefrom, even though occasioned by the negligence of its servants,[5] such a contract not being considered unreasonable or against public policy; since by it the messenger is accorded a privilege which the company is not obliged to give, and the effect of the contract is not to limit the liability of the railroad

company, but to leave it the same as if the express agent had no right in the baggage-car, and simply to secure him from being ejected therefrom.[6] The same principles apply to postal clerks and mail agents.[7] But a volunteer assistant to a train hand, or to a mail agent, or express agent, cannot be considered a passenger;[8] neither is a newsboy who comes upon the train by the sufferance of the carrier's employees.[9]

1 Louisville & N. R. R. Co. v. Crunk, (Ind. 1888).

2 *Commonwealth v. Vermont & Mass. R. R. Co.* 108 Mass. 7; 11 Am. Rep. 361.

3 Yeomans v. Contra Costa Steam Nav. Co. 44 Cal. 71.

4 Pennsylvania R. R. Co. v. Woodsworth, 26 Ohio St. 585.

5 Bates v. Old Colony R. R. Co. (1888) 147 Mass. 255; *Blair v. Erie R. R. Co.* 66 N. Y. 313; 23 Am. Rep. 55.

6 Bates v. Old Colony R. R. Co. (1888), 147 Mass. 255; holding also that Mass. Pub. Stat. ch. 112, § 148, providing that railroad corporations shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, does not require a railroad company to allow an agent of an express company to ride on the baggage car, with the same rights as to injuries caused by accidents as belong to passengers riding in ordinary passenger cars.

7 Seybolt v. New York etc. R. R. Co. 31 Hun, 100; Collett v. London etc. R'y Co. 16 Q. B. 984; *Nolton v. Western Railroad Corporation* (1857), 15 N. Y. 444; 69 Am Dec. 623; S. C. Thompson on Carriers, 37.

8 Union Pacific R. R. Co. v. Nichols, 8 Kan. 505; 12 Am. Rep. 470.

9 Heming v. Brooklyn City R. R. Co. 1 Abb. N. Cas. 433; Snyder v. Hannibal etc. R. R. Co. 60 Mo. 413; Flower v. Pennsylvania R. R. Co. 69 Pa. St. 210; 8 Am. Rep. 251.

§ 859. When the relation of carrier and passenger arises and terminates.—The relation of passenger and carrier usually arises between a traveler and a railway company when the former enters upon the premises of the company,[1] and generally terminates only upon his leaving the grounds controlled by the company.[2] It may, however, arise earlier, as where a person takes an omnibus in which the railway company conveys its passengers to and from the station, whether he has

already purchased his ticket or no, or has expressly declared his intention to become a passenger.[3] It by no means depends upon the person having entered the cars or remaining therein. The cases are numerous in which the relation has been held to exist while the passenger was in the act of boarding the train,[4] or alighting therefrom,[5] while in or about the station,[6] or merely approaching[7] or departing from the depot, over grounds controlled by the company.[8] But a person who on his way from the station has safely reached the public highway, thereupon ceases to be a passenger, and, if he thence proceed to cross the track of the railway, the company's liability to him is only such as it sustains to the public at large.[9] So, also, where a person had alighted from a street-car and walked a block to the company's office, purposing to report a driver who had insulted him and then return to his seat in the car, without, however, communicating his intention of returning to the driver, it was held that the contract of carriage had terminated, and that the company was not liable for an assault upon him by the driver committed on the sidewalk.[10] And the relation of passenger and carrier may terminate even before the passenger leaves the station, if he linger for his own convenience. Thus, where the plaintiff entered a railroad station, intending to take the last train, but, finding it had gone, waited there for a horse-car; and while he waited, the depot master put out some of the lights, preparatory to closing up, and the plaintiff, on leaving, was injured through the darkness on the steps, it was held that he was not a passenger, and that the railroad company was not liable.[11]

1 Gordon v. Grand St. etc. R. R. Co. 40 Barb. 546; Dobiecki v. Sharp, 88 N. Y. 203; Brassell v. New York Central R. R. Co. 84 N. Y. 241; Weston v. New York Elevated R. R. Co. 73 N. Y. 595; Central R. R. Co. v. Perry, 58 Ga. 461; Allender v. Chicago etc. R. R. Co. 37 Iowa, 264.

2 Texas & S. L. R'y Co. v. Orr; 46 Ark. 182; Allerton v. Boston & M. R. R. Co. (1888) 146 Mass. 241; Louisville N. O. & T. R. R. Co. v. Thompson (1887), 64 Miss. 584; Smith v. Central R. & B. Co. 78 Ga. 694.

3 Buffett v. Troy etc. R. R. Co. 40 N. Y. 168.

4 Missouri Pacific R'y Co. v. Watson, (Tex. 1889): Texas Pacific R'y Co. v. Davidson (1887), 68 Tex. 370; *Turner v. Vicksburg etc. R. R. Co.* 37 La. An. 648; 55 Am. Rep. 514; McDonough v. Metropolitan R. R. Co. 137 Mass. 210; Alabama etc. R. R. Co. v. Arnold (1887), 80 Ala. 600; Smith v. St. Paul City R'y Co. 32 Minn. 1; 50 Am. Rep. 550.

5 Missouri Pacific R'y Co. v. Wortham, (Tex. 1889); Van Ostran v. New York Central etc. R. R. Co. 35 Hun, 590; New York C. & St. L. R'y Co. v. Doane (1888), 115 Ind. 435; 7 Am. St. Rep. 451; McGee v. Missouri Pacific R'y Co. 92 Mo. 208. *Cf.* Louisville & N. R. R. Co. v. Crunk (Ind. 1889); Muehlhausen v. St. Louis R. R. Co. (1887) 91 Mo. 332.

6 Parsons v. New York Central etc. R. R. Co. 113 N. Y. 355, where the evidence showed that the deceased, while on a side-track, was struck by a passing train; Nichols v. Chesapeake O. & S. W. R. R. Co. 8 Ky. L. Rep'r, 519; Fordyce v. Merrill (1887), 49 Ark. 277; Jeffersonville R. R. Co. v. Riley, 39 Ind. 568; *McDonald v. Chicago & N. W. R. R. Co.* (1868) 26 Iowa, 124; 96 Am. Dec. 114; *Crafter v. Metropolitan R'y Co.* (1866) Law R. 1 Com. P. 300.

7 Grimes v. Pennsylvania R. R. Co. (1888) 33 Fed. Rep. 72; Green v. Pennsylvania R. R. Co. (1888) 36 Fed. Rep. 66; Grull v Prospect Park etc. R. R. Co. 51 Hun, 643; *Moses v. Louisville N. O. & T. R. R. Co.* (1887) 39 La. An. 649; 4 Am. St. Rep. 231.

8 Texas & S. L. R'y Co. v. Orr, 46 Ark. 182; Smith v. Central R. & B. Co. 78 Ga. 694; Louisville N. O. & T. R. R. Co. v. Thompson (1887), 64 Miss. 584. *Cf.* Dodge v. Boston & B. S. S. Co. (1889) 148 Mass. 207, where a passenger on a steamboat, who went upon shore for breakfast, was held to be entitled to a passenger's right to protection during his egress from the boat.

9 Allerton v. Boston & M. R. R. Co. (1888), 146 Mass. 241.

10 Central R'y Co. v. Peacock (1888), 69 Md. 257.

11 Heinlein v. Boston & P. R. R. Co. (1888), 147 Mass. 136.

§ 860. The passenger's obligations—Observance of rules and regulations.—A passenger must obey all reasonable rules and regulations of the carrier, applicable to him,[1] and generally deport himself in sober and peaceable fashion. Any regulation is reasonable which is necessary for the protection of the carrier, or for the convenience, comfort or safety of its passengers. For example, it is a reasonable rule that passengers shall not ride on the platforms of cars, and where a railway

company was sued for an assault upon a passenger by its employee, who attempted to compel the passenger to go inside of the car on which he was riding, it was held to be error for the court to refuse to charge the jury, that "although there were no seats, and people were standing in the car, yet, if there was room for plaintiff to stand inside, he was bound to go there."[2] So, also, regulations requiring that persons shall buy tickets, or be expelled from the station,[3] or that persons boarding trains, without tickets, shall pay more than the price of a ticket for their fare, have been sustained as reasonable,[4] provided the company has afforded sufficient opportunity to obtain them before the departure of the train.[5] The company may reasonably forbid merchandise to be carried as baggage;[6] it may reasonably exclude men unaccompanied by women from cars reserved for women;[7] or separate its negro passengers from the white.[8] It may reasonably require passengers to show their tickets whenever asked to do so by the conductor;[9] and to surrender them or pay their fare again;[10] and it will be sustained in refusing to accept coupons detached by a passenger, contrary to the notice printed thereon.[11] But a carrier cannot prescribe the dress of its passengers, nor forbid the employees of a rival company to wear their uniform in its cars.[12] The reasonableness of a carrier's rules and regulations is a mixed question of law and of fact.[13]

1 *Railroad Co. v. Jones* (1877), 95 U. S. 439; S. C. Thompson on Carriers, 248; *Bass v. Chicago & North Western R'y Co.* (1874) 36 Wis. 450; 17 Am. Rep. 495; Thompson on Carriers, 311; *Day v. Owen* (1858), 5 Mich. 520; 72 Am. Dec. 62; S. C. Thompson on Carriers, 306.

2 Graville v. Manhattan R'y Co. (1887) 105 N. Y. 525; 59 Am. Rep. 516.

3 Harris v. Stevens, 31 Vt. 79; 73 Am. Dec. 337.

4 Wright v. California Central R'y Co. 78 Cal. 360; Porter v. New York Central R. R. Co. 34 Barb. 353; *Chicago B. & Q. R. R. Co. v. Parks* (1857), 18 Ill. 460; 68 Am. Dec. 562; St. Louis R. R. Co. v. Dalby, 19 Ill. 353; Crocker v. New London etc. R. R. Co. 24 Conn. 249; State v. Gould, 53 Me. 279; Thompson on Carriers, 319. *Vide infra*, § 877.

5 White v. Chesapeake & O. R'y Co. 26 W. Va. 800.

6 Merrihew v. Milwaukee etc. R. R. Co.

7 *Bass v. Chicago & North Western R'y Co.* (1874) 36 Wis. 450; 17 Am. Rep. 495; Thompson on Carriers, 311.

8 Westchester etc. R. R. Co. v. Miles, 55 Pa. St. 209; 93 Am. Dec. 744. *Vide supra*, § 855. *Cf. Day v. Owen* (1858), 5 Mich. 520.

9 Hibbard v. New York etc. R. R. Co. 15 N. Y. 455.

10 Vedder v. Fellows, 20 N. Y. 126; Northern R. R. Co. v. Page, 22 Barb. 130; State v. Thompson, 20 N. H. 250; Wood's Railway Law, 1406.

11 *Louisville & N. R. R. Co. v. Harris*, 9 Lea, 180; 42 Am. Rep. 668.

12 South Florida R. R. Co. v. Rhoads (1889), — Fla. —; 37 Am. & Eng. R. R. Cas. 100.

13 *Day v. Owen* (1858), 5 Mich. 520; 72 Am. Dec. 62; S. C. Thompson on Carriers, 306; Wood's Railway Law, 1406. *Per contra* in Florida, where it is held to be a question of law: South Florida R. R. Co v. Rhoads (1889), — Fla. —; 37 Am. & Eng. R. R. Cas. 100.

§ 861. The same subject, continued—Passengers upon freight trains.—A rule that no conductor in charge of a through freight train shall allow any person to travel as a passenger on his train without a written permit from the superintendent, is a reasonable one, and within the power of a railroad company to prescribe.[1] The company may reasonably forbid persons to ride upon freight trains without first purchasing tickets.[2] There is conflict of authority, however, as to whether the enforcement of such a rule should depend upon the company having afforded opportunity to procure the necessary tickets. The question would seem to be analogous to the one involved in the rule that persons not purchasing tickets before boarding passenger trains, shall pay more than the ticket-price, and there are decisions holding that the enforcement of the rule depends, as in that case,[3] upon the ticket-office being open sufficiently long before the departure of the

train to enable the passenger to purchase his ticket; and that if by reason of the office being closed, he is unable to do so, he may travel upon the freight train by paying or offering to pay the usual amount in money.[4] On the other hand it has been held that the company incurs no liability by ejecting, under such a regulation, a passenger who had no opportunity to purchase a ticket, provided regular passenger trains are duly operated by the carrier.[5] And where a person having purchased a ticket for a point beyond where freight trains were authorized to carry passengers, attempted to ride to the destination named in his ticket, but was required by the conductor to leave the train at the place specified in the regulations of the company, which was before he arrived at his destination, it was held that no action lay against the company by him unless he had been directed by the ticket agent to take that train.[6] There is no doubt that passengers having actual knowledge of the rule may be ejected for noncompliance therewith. Thus, where the conductor and brakeman of a freight train announced to the passengers in the caboose that they must all procure tickets before taking passage, and ample time was given to procure tickets before the train left, it was held to be sufficient notice of the rule, and that a person failing to comply with the regulation might be ejected.[7] But it has been held that without actual notice passengers cannot be expected to know that they must procure tickets before the departure of the train.[8] There is conflict of authority, however, upon this point also, and it has been said that passengers may be affected with knowledge

of the rule by duly posted notices thereof.[9] Where a railway company has a published rule forbidding passengers to ride on "through" freight trains, it is not deemed to have lost the right to begin to enforce it at any time, by the mere fact that passengers have frequently been carried on freight trains; and unless the company appears to have held such trains out to the public for the carriage of passengers, the conductors may eject any who attempt to travel upon them.[10]

1 Thomas v. Chicago & G. T. R'y Co. (1888) — Mich. —

2 Eaton v. Delaware etc. R. R. Co. 57 N. Y. 382; 15 Am. Rep. 513; Chicago & A. R. Co. v. Flagg, 43 Ill. 364; 92 Am. Dec. 133; Arnold v. Illinois Central R. R. Co. 83 Ill. 273; 25 Am. Rep. 386; Cincinnati etc. R. R. Co. v. Bartram, 11 Ohio St. 457; Law v. Illinois Central R. R. Co. 32 Iowa 534 575. *Pittsburg etc. R. R. Co. v. Vandyne*, 57 Ind. 576; 26 Am. Rep. 68.

3 *Vide supra*, § 860.

4 Brown v. Kansas City, Ft. S. & G. R. R. Co. (1888) 38 Kan. 634; Southern Kansas R'y Co. v. Hinsdale (1888), 38 Kan. 507; Evans v. Memphis etc. R. R. Co. 56 Ala. 246; 28 Am. Rep. 771; St. Louis etc. R. R. Co. v. Myrtle, 51 Ind. 566.

5 Jones v. Wabash, S. L. etc. R'y Co. 17 Mo. App. 158; Indianapolis etc. R. R. Co. v. Kennedy, 77 Ind. 507; Cleveland etc. R. R. Co. v. Bartram, 11 Ohio St. 457.

6 South & North Alabama R. R. Co. v. Huffman, 76 Ala. 492; 52 Am. Rep. 339.

7 Southern Kansas R'y Co. v. Hinsdale, 38 Kan. 507.

8 *Dunn v. Grand Trunk R'y Co.* 58 Me. 187; 4 Am. Rep. 267; Illinois Central R. R. Co. v. Sutton, 53 Ill. 397; Thompson on Carriers, 328.

9 Burlington etc. R. R. Co. v. Rose, 11 Neb. 117.

10 Hobbs v. Texas & P. R'y Co. (1887) 49 Ark. 357. But see Brown v. Kansas City, Ft. S. & G. R. R. Co. (1888) 38 Kan. 634, where evidence was admitted to show that such a rule was not enforced.

§ 862. Of the obligation to warn passengers of danger and supply necessary information.—The carrier must furnish to its passengers such information as is necessary to enable them to reach their destination in safety and without detention.[1] Thus, where cars are moved while passengers are at an eating-house, it is the company's duty to have employees ready to direct them to their cars and to in-

form them of a safe way of reaching them.[2] So, also, where cars had been placed in such a position as to obstruct the light from one of the ways of access to a sleeping-coach, the company was held liable for an injury occurring through its failure to have an employee ready to inform passengers of a safer way of access.[3] And a railway company has been held liable for injury to a passenger occurring through its failure to inform him that it was customary to throw mail-bags from trains upon the platform at the place where he was standing.[4] The company is liable not only for a failure to warn its passengers of danger, but also for misinformation given them by its servants, when acting within the scope of their employment. Thus, if through the mistake of a ticket agent a passenger receive a ticket for a shorter distance than it is his purpose to go, or a ticket to a different destination, or through misinformation given him by the agent he takes the wrong train, the company will be liable therefor. But the passenger is not entitled by reason of such misdirection or mistake to remain upon the train which he has taken, without paying his fare. And if he refuse to pay, he may be ejected.[5] When it is through the passenger's own mistake that he takes the wrong train, and having been carried some distance beyond the station, the mistake is discovered, the conductor does not bind the company by directions as to where he shall go, and how he shall go, after alighting from the train, to rectify his mistake, and secure passage on the train he intended to take; for such directions are not within the line of the conductor's duty.[6]

1 See note to Hemmingway v. Chicago etc. R'y Co. 7 Am. Rep. 823, 830, 836.

2 *Peniston v. Chicago etc. R. R. Co.* 34 La. An. 777; 44 Am. Rep. 444.

3 *Moses v. Louisville etc. R. R. Co.* (1887) 39 La. An. 649; 4 Am. Rep. 231.

4 *Carpenter v. Boston etc. R. R. Co.* 97 N. Y. 494; 49 Am. Rep. 540.

5 Bradshaw v. South Boston R. R. Co. 135 Mass. 407; 46 Am. Rep. 481; Weaver v. Rome etc. R. R. Co. 3 Thomp. & C. 270; Frederick v. Marquette etc. R. R. Co. 37 Mich. 342; 26 Am. Rep. 531; Lake Shore etc. R. R. Co. v. Pierce, 47 Mich. 277; 3 Am. & Eng. R. R. Cas. 340; Yorton v. Milwaukee, L. S. etc. R. R. Co. 54 Wis. 234; Pittsburgh, C. & St. L. R. R. Co. v. Nuzum, 60 Ind. 533.

6 Cincinnati, H. & I. R. R. Co. v. Carper (1888), 112 Ind. 26.

§ 863. Of the obligation to furnish seats.—A common carrier must furnish seats sufficient to accommodate the ordinary passenger traffic over its lines.[1] Accordingly, a passenger whom it fails to seat may recover damages for breach of contract.[2] And a passenger injured by a collision is not guilty of contributory negligence in standing upon the platform while the cars are in motion, if there be no vacant seat for him within the car.[3] But the failure of the company to fulfill its duty in this regard, does not justify him in refusing to pay his fare or surrender his ticket; and he may be ejected for refusing so to do.[4] In a late case in Tennessee, a passenger was held not entitled to recovery for an ejection, where it appeared that he entered the ladies' car, and failing to find a seat, refused to surrender his ticket, or to go into the gentlemen's car, alleging that the smoke in the latter would make him sick, and that he would not give up his ticket until furnished with a seat.[5] But if the regular officers of a train neither furnish the passenger with a seat in the regular passenger cars, nor forbid or bar his entrance into the ladies' car, in which he is forbidden to ride by a rule of the company, he has

a right to enter the same, and being thus rightfully in the car, he cannot be removed by force, at least until a seat is offered him elsewhere.[6]

1 Burton v. West Jersey Ferry Co. (1885) 114 U. S. 474.

2 *Memphis & C. R. R. Co. v. Benson* (1887), 85 Tenn. 627; 4 Am. St. Rep. 776, annotated; *St. Louis & I. M. R'y Co. v. Leigh*, 45 Ark. 368; 55 Am. Rep. 558; Davis v. Kansas City etc. R. R. Co. 53 Mo. 317; 14 Am. Rep. 457; Bass v. Chicago & Western R'y Co. (1874) 36 Wis. 450; 17 Am. Rep. 495; 2 Rorer on Railroads, 968, 969; Hutchinson on Carriers, § 609; Thompson on Carriers, 67, 311.

3 Willis v. Long Island R. R. Co. 34 N. Y. 670.

4 *St. Louis & I. M. R'y Co. v. Leigh*, 45 Ark. 368; 55 Am. Rep. 558; *Memphis & C. R. R. Co. v. Benson* (1887), 85 Tenn. 627; 4 Am. St. Rep 776, annotated.

5 *Memphis & C. R. R. Co. v. Benson* (1887), 85 Tenn. 627; 4 Am. St. Rep. 776, annotated.

6 *Bass v. Chicago etc. R'y Co.* 36 Wis. 450; 17 Am. Rep. 495; 39 Wis. 636; 42 Wis. 654; 24 Am. Rep. 437; *Thorpe v. New York etc. R. R. Co.* 76 N. Y. 404; 32 Am. Rep. 325.

§ 864. Of the obligation to treat the sick and infirm humanely.—A railway company must treat such of its passengers as are sick or infirm with humanity and consideration.[1] In a recent case where a passenger, who was stricken with apoplexy, attended with severe vomiting, while riding on a street-car, was removed by the servants of the carrier while in a speechless and helpless condition, and laid in the open street, on a bleak, drizzling December day, and there abandoned with no effort to procure him attention, the company was held liable for the resulting damage, although the passenger's sickness had greatly inconvenienced and discomforted the other passengers.[2] And it was further held, that the mistake of the driver in supposing that the passenger was drunk, when the latter had ridden a considerable distance without misbehavior, and had been guilty of none except the vomiting occasioned by his illness, cannot excuse the company.[3] But

on the other hand, it has been said that "railway cars are not traveling hospitals, nor are railroad employees nurses"; that it is the duty of disabled persons to provide proper assistance for themselves while traveling upon railways; and that any assistance extended by a conductor is an act of courtesy merely.[4] In another case, a railway company was held not liable for the death on its train of a man, who, in a badly wounded condition, was placed on board, against the protest of the conductor, by one pretending to be an officer, and who died of his wounds while under the custody of one claiming to hold him under arrest.[5]

1 Connolly v. Crescent City R. R. Co. (1889) — La. —. *Cf.* Shenandoah Valley R. R. Co. v. Moose (1887), 83 Va. 827, and cases cited *infra*.

2 Connolly v. Crescent City R. R. Co. (1889) — La. —.

3 Connolly v. Crescent City R. R. Co. (1889) — La. —.

4 *New Orleans, Jackson etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478, and note.

5 *Jackson v. St. Louis I. M. R'y Co.* 87 Mo. 422; 56 Am. Rep. 460.

§ 865. Of the obligation to carry upon schedule time.—A railway is liable in damages for breach of contract to any person injured by its failure to run trains upon schedule time.[1] It is no defense that the delay was occasioned by the willful acts of its servants;[2] for the issuing of time-tables is in effect a contract to run its trains upon the schedule time, except in case of accident.[3] But where, through a railway collision, a theatrical company was unable to reach its destination in time to give a performance it had advertised, and had to refund the money for tickets that had been sold, it was held that such money could not be reckoned in the damages recovered.[4]

1 *Weed v. Panama R'y Co.* 17 N. Y. 362; 72 Am. Dec. 474; Sears v. Eastern R. R. Co. 14 Allen, 433; 92 Am. Dec. 780; Gordon v. Manchester

etc. R. R. Co. 32 N. H. 596; 13 Am. Rep 97; Buckmaster v. Great Eastern R'y Co. 23 Law J. Ex. N. S. 471.

2 Sears v. Eastern R. R. Co. 14 Allen, 433; 92 Am. Dec. 780.

3 *Weed v. Panama R'y Co.* 17 N. Y. 362; 72 Am. Dec. 474; *Denton v. Great Northern R'y* (1856), 5 El. & B. 860; Thompson on Carriers, 53.

4 *Georgia R. R. Co. v. Hayden*, 71 Ga. 518; 51 Am. Rep. 274.

§ 866. Of the obligation to allow time for boarding and alighting.—It is a part of the contract of carriage that a reasonable time shall be allowed the passenger to enter the train,[1] and that before starting, the usual signal shall be given;[2] that he shall be carried to his destination;[3] and, after due announcement of the name of the station,[4] that the train shall be stopped, and held for a reasonable time to enable him to alight.[5] When such a reasonable time has thus elapsed, it is no part of the duty of the servants of the company to make personal inspection of, or to interrogate the remaining passengers, to see whether they intend leaving the cars.[6] It is for the jury to determine what time is sufficient and reasonable. Evidence as to the usual time of stopping is admissible;[7] and, from the fact that other passengers, similarly situated as to age, sex, etc., had safely left the cars, the jury may legitimately infer that a reasonable time was allowed the plaintiff to alight in safety.[8]

1 Texas Pacific R'y Co. v. Davidson (1887), 68 Tex. 370, where the appellant was held liable for an injury to a passenger sustained through attempting to board a train, which started before the expiration of the time designated by the conductor; Lee v. Manhattan R'y Co. 53 N. Y. Super. Ct. 260, where a person was injured by the conductor of an elevated train shutting the gate on his foot, while attempting to step on, and starting the train, without having given any signal, and the company was held liable. *Cf.* Rochat v. North Hudson etc. R. R. Co. 49 N. J. 445, where a street-car company was held not to be liable for an injury caused by the starting of its cars in the usual manner.

2 McQuade v. Manhattan R'y Co. 53 N. Y. Super. Ct. 91.

3 Damages are recoverable for being carried beyond destination, and also for injuries resulting directly therefrom: *New York C. & St. L. R'y Co. v. Doane* (1888), 115 Ind. 435; 7 Am St. Rep. 451; *International & G. N. R'y Co.*

v. Terry, 62 Tex. 380; 50 Am. Rep. 529; Galveston H. & H. R'y Co. v. Crispi, (1889), — Tex. —; Mississippi & T. R. R. Co. v. Gill (1883), — Miss. —; Louisville & N. R. R. Co. v. Ballard (1889), — Ky. —.

4 Louisville, N. O. etc. R'y Co. v. Mask (1887), 64 Miss. 738.

5 Chesapeake & O. R'y Co. v. Reeves' Adm'r (1889), —Ky. —; Louisville & N. R. R. Co. v. Crunk (1888), —Ind. —; Louisville, N. O. etc. R'y Co. v. Mask (1887), 64 Miss. 738; Norfolk & W. R. R. Co. v. Prinnell (1837), — Va. —; St. Louis etc. R'y Co. v. Person, 49 Ark. 182; *Hurt v. St. Louis, I. M. & S R'y Co.* (1887) 94 Mo. 255; 4 Am. St. Rep. 374, 378; Louisville etc. R. R. Co. v. Wood, 113 Ind. 546. *Cf.* Cincinnati etc. R. R. Co. v. Carper, 112 Ind. 26; 2 Am. St. Rep. 154, annotated.

6 *Hurt v. St. Louis etc. R'y Co.* (1887) 94 Mo. 255; 4 Am. St. Rep. 374, 378 (annotated).

7 Chesapeake & O. R'y Co. v. Reeves' Adm'r (1889), — Ky. —.

8 *Hurt v. St. Louis etc. R'y Co.* (1887) 94 Mo. 255; 4 Am. St. Rep. 374, 378, annotated.

§ 867. Of the obligation to carry to destination.—It is the duty of a railway company to carry the passenger to his destination, and there to stop and allow him a reasonable time to alight, and if it carry him beyond, it is liable for breach of contract, and for any injury directly resulting therefrom.[1] A passenger, who has purchased a ticket to a station at which the train he takes passage on does not stop, is entitled to be carried to an intermediate station where it does stop;[2] and if he refuse to leave the train at the nearest station, he may be ejected.[3] When passengers are required to alight at a point other than the regular place of stopping, they should be informed of any attending danger, otherwise the company will be liable for injury occurring by reason thereof.[4] Thus, damages were awarded against a railway company for an injury sustained by a person in falling through a cattle-guard or trestle upon his way back to the station, where he should have gotten off the train, but past which he was carried without any contributory negligence on his part.[5] In a recent case, where a woman, having two children in charge and being

without money, was carried beyond the station at a late hour of night, and was not informed of the difficulties in the way of her returning under those circumstances, it was held not to be her duty to go on to the next city, rather than to attempt to find her way back to her destination.[6] In reckoning the damages of a passenger who was carried beyond his destination, and who, in consequence of being put off at a place of great exposure in the midst of inclement weather, contracted pneumonia, it has been held that his physical suffering, the expense to which he was put, and the loss to his business, should be considered.[7] In a late case in Kentucky, where it was in evidence that the train passed the plaintiff's station without stopping; that plaintiff asked to be put off, but the conductor refused, offering to take her on to the next station; that plaintiff got off the train between stations, the conductor not offering to assist her in any way, and his voice and manner being rude and insulting; that she walked back about a mile, carrying a bundle and valise; that her route lay through an uninhabited country; and that, as a result of the walk and the excitement, she was sick for several days; it was held, upon a second trial, although there was conflicting testimony as to these facts, that a verdict of three thousand dollars would not be disturbed.[8] But exemplary damages are not recoverable for the company's failure to stop at a station and to allow an opportunity for alighting, unless the failure so to do was willful, or the wrong was aggravated by insult.[9]

1 Galveston, H. & H. R'y Co. v. Crispi (1889), — Tex. —; *International & G. N. R'y Co. v. Terry*, 62 Tex. 380; 50 Am. Rep. 529; Louisville & N. R. R. Co. v. Ballard, 85 Ky. 302; Mississippi & T. R. R. Co. v. Gill (1889), — Miss. —;

New York, C. & St. L. R'y Co. v. Doane (1888), 115 Ind. 435; 7 Am. St. Rep. 451; Kellett v. Chicago & A. R. R. Co. 22 Mo. App. 356.

2 *Richmond, F. etc. R. R. Co. v. Ashby*, 79 Va. 130; 52 Am. Rep. 620.

3 *International & G. N. R'y Co. v. Hassell*, 62 Tex. 256; 50 Am. Rep. 525.

4 *New York, C. & St. L. R'y Co. v. Doane* (1888), 115 Ind. 435; 7 Am. St. Rep. 451.

5 Winkler v. St. Louis, I. M. etc. R'y Co. 21 Mo. App. 99.

6 Galveston, H. & H. R'y Co. v. Crispi (1889), — Tex. —

7 *International & G. N. R'y Co. v. Terry*, 62 Tex. 380; 50 Am. Rep. 529.

8 Louisville & N. R. R. Co. v. Ballard, 85 Ky. 302.

9 Mississippi & T. R. R. Co. v. Gill (1889), — Miss. —; *Dorrah v. Illinois Central R. R. Co.* (1887), 65 Miss. 14; 7 Am. St. Rep. 629; *Chicago etc. R. R. Co. v. Scurr*, 59 Miss. 456; 42 Am. Rep. 733; Vicksburg etc. R. R. Co. v. Scanlon, 63 Miss. 413.

§ 868. The same subject, continued.—Express trains and local travel.—A passenger, however, is affected with knowledge of the published rules of the carrier with respect to the stopping of trains at his destination,[1] and it is his duty to inform himself as to whether the train which he takes will stop at the place to which he desires to go.[2] For a railway company is under no obligation to stop all of its trains at every station upon its route, and it is not liable to a passenger for refusing to allow him an opportunity to alight when he has taken a train which, according to the regulations of the company, does not stop at his destination, unless an express agreement be made to the contrary,[3] or unless he has been misdirected, or led to believe by an authorized agent of the company, that the train taken by him will stop at that station.[4] But by selling a ticket "good for passenger trains only," the company does not contract that every passenger train shall stop at the station designated upon the ticket;[5] nor is the conductor bound to awaken a sleeping passenger at his destination, and, even though he has promised to do so, the company is

not liable for carrying the passenger beyond his station by reason of the conductor failing to awaken him;[6] nor where the position of a station has been changed, and trains have been uniformly stopped at the new depot for some time, is the company under any obligation to carry a passenger having no notice of the change to the former station, half a mile distant;[7] nor is the company liable for injuries sustained by a passenger, who, fearing that the train will not stop at his destination, jumps off while it is passing the station for the purpose of being switched on to a side track, according to regular custom, to allow another train to make use of the main track.[8]

1 Trotlinger v. East Tennessee etc. R. R. Co. 11 Lea (Tenn.), 533.

2 *Ohio etc. R. R. Co. v. Swarthout*, 67 Ind. 567; 33 Am. Rep. 104; Ohio etc. R. R. Co. v. Hatton, 60 Ind. 12.

3 Plott v. Chicago & N. R. R. Co. 63 Wis. 511.

4 Pittsburgh etc. R. R Co. v. Nuzum, 50 Ind. 141; Florida Southern R'y Co. v. Katz (1887), 23 Fla. 139, where the passenger's fare to a certain point was accepted in silence, and he was not notified until afterward that the train would not stop there. *Cf.* Hull v. East Line etc. R. R. Co. (1887), 66 Tex. 519, where, although the passenger's destination was not a regular station, trains had been accustomed to stop there, and his fare to that point was accepted, he was held entitled to recover upon breach of contract, for being carried beyond.

5 *Ohio etc. R. R. Co. v. Swarthout*, 67 Ind. 567; 33 Am. Rep. 104.

6 *Munn v. Georgia R. R. Co.* 71 Ga. 710; 51 Am. Rep. 284.

7 Martindale v. Kansas City R. R. Co. 60 Mo. 508.

8 Hemminway v. Chicago M. & St. P. R'y Co. (1887) 67 Wis. 668.

CHAPTER XXXIV.

THE CONTRACT OF CARRIAGE—TICKETS AND EXPULSION.

§ 869. Of tickets—Their nature as vouchers or receipts.
§ 870. Admissibility of the ticket as evidence of the terms of the contract.
§ 871. Limited tickets.
§ 872. Of the right to stop-over.
§ 873. Non-transferable tickets.
§ 874. Non-detachable coupon tickets.
§ 875. Season or commutation tickets.
§ 876. Tickets to be exhibited whenever demanded.
§ 877. Failure to procure ticket—Additional charge.
§ 878. Conductors' checks given in lieu of tickets.
§ 879. Of the power of expulsion—(*a*). In general.
§ 880. (*b*). Expulsion to preserve the public peace, morals, and health.
§ 881. (*c*). Expulsion for refusal to pay or to present a ticket.
§ 882. (*d*). Expulsion for violation of rules and regulations.
§ 883. (*e*). Expulsion for breach of the contract of carriage.
§ 884. Of tender after refusal to pay—Resumption of journey.
§ 885. Of the place of expulsion—At common law.
§ 886. Of the place of expulsion—Statutory regulations.
§ 887. Damages for wrongful expulsion of passengers.
§ 888. Damages for unnecessary violence in expulsion of passengers or trespassers.
§ 889. The same subject, continued and illustrated.
§ 890. Elements of damage.
§ 891. Mental suffering, shame, and humiliation as elements of damage.
§ 892. Of the *quantum* of damages.
§ 893. Of punitive, exemplary, vindictive, or added damages.
§ 894. The same subject, continued.
§ 895. Punitive damages for expulsion without violence or insult.
§ 896. Mitigation of damages.

§ 869. Of tickets.—Their nature as vouchers or receipts.—A railway ticket is a mere voucher or

receipt, and is not itself the contract of carriage.[1] Accordingly, the terms of the contract between the railway carrier and its passenger may be proven by parol.[2] By such evidence it may be shown that the usual contract of carriage had been varied in a particular instance, or that the acts of an authorized agent of the company amounted to a waiver of the conditions expressed in the ticket.[3] And the company is liable for refusing to carry the purchaser of a ticket who performs or offers to perform in proper time and manner all the stipulations of the contract on his part, notwithstanding any omission or mistake by its agents, or of the passenger acting at the direction of the company's agent.[4] Thus, the company has been held liable for ejecting a passenger whose round-trip ticket was taken up on the first trip, and who in good faith, endeavored to return upon the conductor's check given in lieu thereof.[5] Upon the same principle, the carrier is liable for refusing to honor a ticket not properly stamped, through its agent's fault, or not properly signed by a passenger acting under the direction of its agent.[6] For the possession of a ticket is *prima facie* evidence of ownership, and the failure of a passenger to sign the contract upon a special ticket in the absence of evidence that he was requested to do so, does not invalidate it, as the signature is merely a convenient mode of identifying the passenger.[7] So, also, where the plaintiff had paid the ticket agent the price of a first-class passage, it was held that he might recover for breach of contract in being required to ride in a second-class car, although the ticket which he presented to the conductor proved, through the mistake of the agent, to

be second-class.[8] Where a ticket has been purchased in good faith, by a passenger, of the authorized ticket agent of a railway company, and the passenger states the facts of the purchase to the conductor, and that he believed the ticket to be genuine, issued by the company, and such as the agent had a right to sell, the conductor must accept those facts as true until the contrary is proved, without regard to any words, figures, or other marks on the ticket; and if, upon the passenger's refusal to pay additional fare, he lays hands upon him to eject him from the train, he will be deemed guilty of assault and battery, and the company held liable in damages.[9] But the ticket, also, is competent *prima facie* evidence of the nature of the contract, and unless it be shown that in the case at bar there was some special agreement between the parties, or some mistake on the part of the company's agent, the ticket will be taken as conclusive that the contract was such as is ordinarily entered into by passengers purchasing similar tickets.[10]

1 Chollette v. Omaha & R. V. R. Co. (1889) — Neb. —; Pier v. Finch, 24 Barb. 514; Quimby v. Vanderbilt, 17 N. Y. 306; 72 Am. Dec. 469; Rawson v. Pennsylvania R. R. Co. 48 N. Y. 212; 8 Am. Rep. 543; Baltimore & O. R. R. Co. v. Campbell, 36 Ohio St. 647; 38 Am. Rep. 617, 618; Elmore v. Sands, 54 N. Y. 512; 13 Am. Rep. 617; Brown v. Eastern R. R. Co. 11 Cush. 97; Logan v. Hannibal etc. R. R. Co. 12 Am. & Eng. R. R. Cas. 141; Nevins v. Bay State, 4 Bosw. 225; Henderson v. Stevenson, Law R. 2 Sc. App. 470; State v. Overton, 24 N. J. 435; 61 Am. Dec. 671; Gordon v. Manchester etc. R. R. Co. 52 N. H. 596; 13 Am. Rep. 97; Johnson v. Concord R. R. Co. 46 N. H. 213; 88 Am. Dec. 199.

2 Robinson v. Nashville etc. R. R. Co. 2 Lea (Tenn.) 594; Van Kirk v. Pennsylvania R. R. Co. 76 Pa. St. 66; 18 Am. Rep. 404; Burnham v. Grand Trunk R. R. Co. 63 Me. 298; 18 Am. Rep. 220; Melville v. Baltimore etc. R. R. Co. 2 Mackay (D. C.), 63.

3 Taylor v. Seaboard etc. R. R. Co. (1888), 99 N. C. 185, cited *infra*; Head v. Georgia Pacific R'y Co. 79 Ga. 358; Kent v. Baltimore & O. R. R. Co. (1887), 45 Ohio St. 284; 4 Am. St. Rep. 539. But see Hall v. Memphis etc. R. R. Co. 15 Fed. Rep. 57, cited *infra*.

4 Head v. Georgia Pacific R'y Co. (1888) 79 Ga. 358; Hufford v. Grand Rapids & I. R. R. Co. 64 Mich. 631.

5 Baltimore & O. R. R. Co. v. Bambrey (1888), — Pa. St. —.

6 Head v. Georgia Pacific R'y Co. 79 Ga. 358; Taylor v. Seaboard etc. R. R. Co. (1888), 99 N. C. 125, where parol evidence was admitted to show a waiver of the condition respecting signing and stamping.

7 Gregory v. Burlington etc. R. R. Co. 10 Neb. 250.

8 St. Louis, A. & T. R'y Co. v. Mackie, 71 Tex. 491, where it was also held that the passenger's right of action was not affected by the conductor's offer to let him remain if he would pay one cent a mile in addition to what he had paid for his ticket, or by the rule of defendant, that the conductor could only look to the ticket, and had no right to inquire if plaintiff was entitled to a first-class passage.

9 Hufford v. Grand Rapids & I. R. R. Co. 64 Mich. 631.

10 *Great Western R'y Co. v. Pocock* (1879), 28 Week. R. 49; S. C. Thompson on Carriers, 63; Kelley v. Boston etc. R. R. Co. 67 Me. 163. *Cf.* Carpenter v. Washington & G. R. R. Co. 121 U. S. 474.

§ 870. **Admissibility of the ticket as evidence of the terms of the contract.**—It follows from the admissibility of the ticket as *prima facie* evidence of the nature of the contract of carriage, that if by its terms it was evidently intended to be used for a certain part of the carrier's route,[1] or for a limited time,[2] or "for a continuous trip only" or "not good to stop-off,"[3] or for a train going in a certain direction,[4] or for all trains except one specified on the ticket,[5] or, as in case of a round-trip ticket sold upon the condition that the passenger shall have himself identified before using it on the return trip,[6] the company will not be held to have contracted to carry the purchaser otherwise than in accordance with the stipulations contained in the ticket, especially where, in consideration of such limitations, the ticket was sold for less than others containing no such conditions;[7] unless, of course, the passenger can show that such conditions had been varied or waived.[8] Thus, where the mileage tickets of a company operating two lines, were printed with figures in red and in black, it was held that the company was not liable for the ejec-

tion of a passenger refusing to pay for his carriage over the line represented by the red figures otherwise than by a ticket in which only black figures remained unpunched.[9] But it is well settled that the purchaser of a railroad ticket does not, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them.[10] And the railway company cannot by means of printed notices and stipulations in the ticket limit its liability for injuries to passengers occurring through the negligence of its servants.[11]

1 *Great Western R'y Co. v. Pocock* (1879), 28 Week. Rep. 49; S. C. 10 Cent. Law J. 84; S. C. Thompson on Carriers, 63.

2 Hall v. Memphis etc. R. R. Co. 15 Fed. Rep. 57, where parol evidence of an agreement with the ticket agent that it should be good after expiration was held inadmissible.

3 Johnson v. Philadelphia etc. R. R. Co. 63 Md. 106.

4 Kelley v. Boston etc. R. R. Co. 67 Me. 163.

5 Nolan v. New York etc. R. R. Co. 41 N. Y. Super. Ct. 541.

9 Rawitzky v. Louisville & N. R'y Co. (1838), 40 La. An. 47; Moses v. East Tennessee etc. R. R. Co. 73 Ga. 356; Mosher v. St. Louis, I. M. etc. R'y Co. 23 Fed. Rep. 325.

7 Pennington v. Philadelphia etc. R. R. Co. 62 Md. 106, and cases cited *supra*.

8 *Vide supra*, § 869.

9 Terre Haute etc. R. R. Co. v. Fitzgerald, 47 Ind. 79.

10 Kent v. Baltimore etc. R. R. Co. (1887), 45 Ohio St. 539; 4 Am. St. Rep. 533, 541; Baltimore & O. R. R. Co. v. Campbell, 36 Ohio St. 647; 38 Am. Rep. 617; Davidson v. Graham, 2 Ohio St. 135; Jones v. Voorhies, 10 Ohio, 145; Rawson v. Pennsylvania R. R. Co. 48 N. Y. 212; 8 Am. Rep. 513; 2 Wharton on Evidence, § 1243; Brown v. Eastern R. R. Co. 11 Cush. 97; Malone v. Boston etc. R. R. Co. 12 Gray, 388; 74 Am. Dec. 598; Camden & Amboy R'y Co. v. Baldauf, 16 Pa. St. 67; 55 Am. Dec. 481; Wade on Notices, §§ 543, 552, 554, 555; Lawson on Carriers, §§ 106, 107; Blossom v. Dodd, 43 N. Y. 264; 3 Am. Rep. 701; Quimby v. Vanderbilt, 17 N. Y. 306; 72 Am. Dec. 469.

11 *Vide infra*, § 962.

§ 871. **Limited tickets.** — The contract of carriage, of which a railway ticket is a memorandum in writing, is subject to the same statutory limitation as other contracts of like character, unless the ticket contain some stipulation to the contrary.[1]

Even an excursion ticket, containing nothing to the contrary, has been held to be good at any time within the statutory period.[2] The phrase, "good for this *trip* only," printed upon a ticket, has been construed as not imposing a limitation upon the time within which it may be used.[3] But words indicating that the ticket shall be good for "this day" or "this train" only, cannot be used subsequently, nor upon another train.[4] And tickets containing such limitations have no validity after the expiration of the time specified, even though not previously used.[5] Thus, a mileage ticket limited to six months is not available thereafter, even though the owner has not ridden the full number of miles to which he would otherwise have been entitled.[6] But if a person begin his journey before the expiration of the time limit, he is entitled to be carried to his destination, notwithstanding its termination while *en route*.[7] So, also, where it is impossible for him to use the ticket within the specified time, as, for example, when an accident has occurred which prevents the running of trains, the company must accept it.[8] Likewise, if the time for which a ticket over connecting lines is limited expires on Sunday, and the last line does not run trains on that day, it must carry the passenger on the day following.[9] And a person cannot be treated as a trespasser who takes a train after his ticket has expired, believing it practicable to travel upon paying the conductor in money the difference between the redeemable value of his ticket and the full fare for his passage.[10]

1 Pier v. Finch, 24 Barb. 514; Drew v. Central Pacific R. R. Co. 51 Cal. 425; Pennsylvania R. R. Co. v. Spicker, 105 Pa. St. 142.

2 Pe sania R. R. Co. v. Spicker, 105 Pa. St. 142.

3 Pier v. Finch, 24 Barb. 514; Drew v. Central Pacific R. R. Co. 51 Cal. 425.

4 Elmore v. Sands, 54 N. Y. 512; 13 Am. Rep. 617; Boice v. Hudson River R. R. Co. 61 Barb. 611; Barker v Coffin, 31 Barb. 556; Shedd v. Troy & Boston R. R. Co. 40 Vt. 88; McClure v. Philadelphia etc. R. R. Co. 34 Md. 532; 6 Am. Rep. 345.

5 Pennington v. Philadelphia, W. etc. R. R. Co. 62 Md. 95; *Gale v. Delaware etc. R. R. Co.* 7 Hun, 670; Hill v. Syracuse etc. R. R. Co. 63 N. Y. 101; Nelson v. Long Island R. R. Co. 7 Hun, 140; Boston & L. R. R. Co. v. Proctor, 1 Allen, 267; State v. Campbell, 32 N. J. 301.

6 Lillis v. St. Louis etc. R. R. Co. 64 Mo. 464.

7 *Lunay v. Central Pacific R. R. Co.* 66 Cal. 191; 56 Am. Rep. 100 *Auerbach v. New York & Hudson River R. R. Co.* 89 N. Y. 281; 42 Am. Rep. 290; Hill v. Syracuse etc. R. R. Co. 63 N. Y. 101; Evans v. Iron Mountain etc. R. R. Co. 25 Ohio St. 70.

8 *Auerbach v. New York & Hudson River R. R. Co.* 89 N. Y. 281; 42 Am. Rep. 290; Mosher v. St. Louis, Iron Mountain etc. R. R. Co. 17 Fed. Rep. 880.

9 *Little Rock & F. S. R'y Co. v. Dean*, 43 Ark. 529; 51 Am. Rep. 584. But see Pennsylvania R. R. Co. v. Hine, 41 Ohio St. 276.

10 Arnold v. Pennsylvania R. R. Co. (1887) 15 Pa. St. 135; 2 Am. St. Rep. 542.

§ 872. **Of the right to stop over.**—If a ticket for carriage on a railway between certain *termini* be silent as to the time when or within which it may be used, it does not authorize the holder to stop over at any point between those termini, and resume his journey thereon on the next or any subsequent train. For the contract of carriage is an entirety, and must be completed according to its terms and not according to the convenience of the passenger.[1] When, however, stop-over tickets or checks are given, they are binding upon the company and upon the passenger alike. The former must honor them when presented by the latter within the time allowed.[2] The company cannot deny the authority of its conductor to permit a passenger to leave the train and continue his trip on the same ticket.[3] A passenger having a ticket with separate coupons for each of several connect-

ing lines, has a right to stop over at the *termini* of each road and to continue his journey on the same ticket during the continuance of its life.[4]

1 Roberts v. Koehler (1887), 30 Fed. Rep. 94; Hill v. Syracuse etc. R. R. Co. 63 N. Y. 101; Hamilton v. New York Central R. R. Co. 51 N. Y. 100; Dunphy v. Erie R. R. Co. 10 Jones & S. 128; Parker v. Coffin, 31 Barb. 556; Terry v. Flushing etc. R. R. Co. 13 Hun, 359; Beebe v. Ayres, 28 Barb. 275; Stone v. Chicago etc. R. R. Co. 47 Iowa, 62; Drew v. Central Pacific R. R. Co. 51 Cal. 425; Oil Creek etc. R. R. Co. v. Clark, 72 Pa. St. 231; Cheney v. Boston etc. R. R. Co. 11 Met. 121; 45 Am. Dec. 193; Johnson v. Concord R. R. Co. 46 N. H. 213; 88 Am. Dec. 199; Breen v. Texas etc. R. R. Co. 50 Tex. 43; Cleveland etc. R. R. Co. v. Bertram, 11 Ohio St. 457; Dietrick v. Pennsylvania R. R. Co. 71 Pa. St. 432; 10 Am. Rep. 711; *Petrie v. Pennsylvania etc. R. R. Co.* 42 N. J. 449. *Contra*, in Maine by statute: Dryden v. Grand Trunk R. R. Co. 60 Me. 512.

2 *Wentz v. Erie R. R. Co.* 3 Hun, 241; Churchill v. Chicago etc. R. R. Co. 67 Ill. 390; Johnson v. Concord R. R. Co. 46 N. H. 213; 88 Am. Dec. 199; Dietrich v. Pennsylvania R. R. Co. 71 Pa. St. 432; 10 Am. Rep. 711.

3 Tarbell v. Northern Central R. R. Co. 24 Hun (N. Y.), 51.

4 *Auerbach v. New York & Hudson River R. R. Co.* 98 N. Y. 281; 42 Am. Rep. 290; Knight v. Portland etc. R. R. Co. 56 Me. 234; 96 Am. Dec. 449; Milnor v. New York etc. R. R. Co. 4 Daly, 355. *Cf.* Brooks v. Grand Trunk R. R. Co. 15 Mich. 332.

§ 873. Non-transferable tickets. — A person riding upon a non-transferable ticket issued to another, is not a passenger within the rule holding carriers liable for injuries caused by negligence.[1] And a carrier may refuse to accept non-transferable tickets from persons to whom they were not originally issued; and conductor's checks given in place of such tickets are likewise non-transferable.[2] So also, where a person had a non-transferable ticket, which he purchased for his wife, made out in a fictitious name, the conductor was held to be justified in refusing to accept it, and in expelling her from the train when she refused to pay her fare.[3]

1 *Way v. Chicago, R. I. etc. R'y Co.* 64 Iowa, 48; 52 Am. Rep. 431.

2 Walker v. Wabash, St. L. etc. R'y Co. 15 Mo. App. 333; Cody v. Central Pacific Co. 4 Sawyer (U. S. Cir. Ct.), 114; Langdon v. Howell, Law R. 4 Q. B. Div. 437.

3 Chicago & Northwestern R'y Co. v. Bannerman, 15 Ill. App. 100.

§ 874. Non-detachable coupon tickets.—Stipulations in railway tickets consisting of several parts, commonly called "coupons," to the effect that they will not be received by the carrier if detached by the passenger, are generally upheld as reasonable.[1] And a passenger whom the conductor sees in the act of detaching the coupons, should desist at once upon being notified of its irregularity. In that case, however, the conductor must accept such of the coupons as were detached in his presence; but he is under no obligation to receive them without seeing the ticket also.[2] The absence of any intention to defraud the company by detaching the coupons, is no justification of a violation of the rule by a passenger whose ticket contained such notification.[3] But a carrier cannot legally refuse to accept coupons detached without the passenger's fault, when the circumstances are explained to the conductor and all the parts of the ticket presented to him.[4] Evidence that a conductor had on many occasions previously accepted detached coupons, is inadmissible except to prove a custom.[5]

1 Louisville & N. R. R. Co. v. Harris, 9 Lea, 130; 42 Am. Rep. 668, 670; Marshall v. Boston & A. R. R. Co. (1887) 145 Mass. 164; Wightman v. Chicago & N. W. R'y Co. 73 Wis. 169; Northwestern etc. R. R. Co. v. Wysor 82 Va. 250; Boston etc. R. R. Co. v. Chipman (1888), 146 Mass. 107; 4 Am. St. Rep. 293, annotated; Houston etc. R. R. Co. v. Ford, 53 Tex. 364.

2 Louisville etc. R. R. Co. v. Harris, 9 Lea, 130; 42 Am. Rep. 668, 670.

3 Marshall v. Boston & A. R. R. Co. (1887) 145 Mass. 164.

4 Wightman v. Chicago & N. W. R'y Co. 43 Wis. 169.

5 Marshall v. Boston & A. R. R. Co. (1887) 145 Mass. 164.

§ 875. Season or commutation tickets.—The carrier must give reasonable notice to the holders of season tickets of any purposed change of schedule.[1] A family commutation ticket is good for the

passage of children remaining members of the household after the attainment of majority.[3] Where the members of a firm were entitled by contract to occupy one seat, and to be carried one at a time upon the passenger trains of a railway company, it was held that but one ticket should be issued to the firm, and this ticket should be presented whenever any one of the partners took passage upon the cars of the company.[3] The conductor's knowledge that a passenger is the owner of a season ticket does not obviate the necessity of his producing and exhibiting it when required to do so.[4]

1 Sears v. Eastern R. R. Co. 14 Allen, 433; 92 Am. Dec. 780.

2 Chicago etc. R. R. Co. v. Chisholm, 79 Ill. 584.

3 Knopf v. Richmond, F. & P. R. R. Co. (1889) — Va. —, 37 Am. & Eng. R. R. Cas. 140, where it was also held that whether or no the ticket should be renewed by the company without application from the firm was for the jury to determine, upon the practical construction put upon the contract by the parties thereto.

4 *Vide infra*, § 876, note 3.

§ 876. Tickets to be exhibited whenever demanded.—His ticket being the only evidence of a passenger's right to carriage, he must produce it whenever called upon to do so by an authorized agent of the carrier.[1] And this rule is not varied by the fact that the conductor, from having seen and punched the ticket before, knows that the passenger had purchased one,[2] nor by the conductor's knowledge of the passenger being the owner of a season ticket.[3] But the passenger is entitled to a reasonable time to find his ticket, if he has misplaced it,[4] provided he had no knowledge of its loss before entering the train,[5] or has not sold it,[6] the reasonableness of the time allowed being in each case a question of fact for the jury.[7] But after a reasonable time for the discovery of the

ticket, the passenger may be required to pay for his fare,[8] or, upon his refusal to pay, he may be ejected from the train.[9]

1 Louisville & N. R. R. Co. v. Maybin (1889), — Miss. —; Hibbard v. New York & E. R. R. Co. 15 N. Y. 455; Frederick v. Marquette etc. R. R. Co. 37 Mich. 342; 26 Am. Rep. 531; Pittsburg etc. R'y Co. v. Vandyne, 57 Ind. 576; 26 Am. Rep. 68; *Downs v. New York etc. R. R. Co.* 36 Conn. 287; 4 Am. Rep. 77. See, also, the annotations to Commonwealth v. Power, 41 Am. Dec. 473.

2 Robson v. New York Central R. R. Co. 21 Hun, 387.

3 *Downs v. New York etc. R. R. Co.* 36 Conn. 287; 4 Am. Rep. 77; *Cresson v. Philadelphia etc. R. R. Co.* 11 Phila. 597; Cooper v. London etc. R'y Co. Law R. 4 Ex. Div. 88; Ripley v. New Jersey R. R. Co. 31 N. J. —; *Cf.* Knopf v. Richmond, F. & P. R. R. Co. (Va. 1889); 37 Am. & Eng. R. R. Cas. 140, cited *supra*, § 875.

4 International & G. N. R. R. Co. v. Wilkes (1887), 68 Tex. 617; Knowles v. Norfolk S. R. R. Co. 102 N. C. 59; Maples v. New York etc. R. R. Co. 38 Conn. 557; 9 Am. Rep. 434; Hays v. New York Central R. R. Co.

5 *Downs v. New York etc. R. R. Co.* 36 Conn. 287; 4 Am. Rep. 77; Crawford v. Cincinnati etc. R. R. Co. 26 Ohio St. 580.

6 Louisville & N. R. R. Co. v. Maybin (1889), — Miss. —.

7 International & G. N. R. R. Co. v. Wilkes (1887), 68 Tex. 617.

8 Jerome v. Smith, 48 Vt. 230; 21 Am. Rep. 125; Duke v. Great Western R'y Co. 14 Up. Can. Q. B. 377; Standish v. Narragansett Steamship Co. 111 Mass. 512; 15 Am. Rep. 66. See, also, annotations to Commonwealth v. Power, 41 Am. Dec. 473; and to Boston etc. R. R. Co. v. Chapman (1888), 4 Am. St. Rep. 293.

9 *Vide* cases cited *supra*, and in § 881 *infra*. See, also, Louisville & N. R. R. Co. v. Maybin (1889), — Miss. —.

§ 877. Failure to procure ticket—Additional charge.—A railway company keeping offices open for the sale of tickets may reasonably exact from a person paying on the train more than it charges for tickets,[1] unless the price of a ticket is itself as much as the carrier is permitted to charge under a statutory regulation of rates.[2] The legal enforcement of the regulation, however, depends upon the company having afforded opportunity for the purchase of tickets by opening its office at a sufficient time before the leaving of the train to enable all persons to procure them,[3] in which case the passenger's having arrived at the station too late to buy a ticket, is no excuse for his failure to procure

it.[4] The company need not keep its office open until the departure of the train, but may close it when there remains insufficient time for a person arriving late to purchase a ticket and reach the train before it begins to move.[5] And upon the passenger's refusal to pay the extra charge, he may be ejected. But the additional charge must not be extortionate;[6] and the passenger may produce evidence to show that he and others had never paid more than the amount which he tendered on the occasion of his ejectment.[7] If he has paid the price of a ticket to the conductor, the money must be returned *prior* to his ejection for refusing to pay the additional amount, otherwise the company will be liable in damages for his expulsion.[8] Where a passenger at first refused to pay the sum demanded by the conductor, but, upon the train being stopped to expel him, then tendered the amount, it was held that the conductor should have accepted it, unless his conduct was willful, and that his ejection was unlawful.[9] In another case in which the conductor had refused a tender of the ticket-fare, and the passenger, not having the extra amount, made efforts to borrow it, but did not succeed until the train was slowing up for his expulsion, it was held that in the absence of evidence of his having taken an unreasonable time to procure the money, the conductor should have accepted it, and that the company was liable for his expulsion.[10]

1 Wright v. California Central R'y Co. (1889), 78 Cal. 360; State v. Hungerford (1888), 39 Minn. 6; Du Laurans v. Railroad Co. 15 Minn. 49; Am. Rep. 102; *Chicago, Burlington & Quincy R. R. Co. v. Parks* (1857), Ill. 460; 63 Am. Dec. 362; S. C. Thompson on Carriers, 319.

2 Smith v. Pittsburgh etc. R. R. Co. 20 Ohio St. 10.

3 Poole v. Northern Pacific R. R. Co. (1888), 16 Or. 261; White v.

Chesapeake & O. R'y Co. 26 W. Va. 800; Pullman Palace Car Co. v. Reed, 73 Ill. 125; 20 Am. Rep. 232; Du Laurans v. St. Paul etc. R. R. Co. 15 Minn. 49; 2 Am. Rep. 102; Lane v. East Tennessee etc. R. R. Co. 5 Lea, 124; St. Louis etc. R. R. Co. v. Dalby, 19 Ill. 353; Chicago etc. R. R. Co. v. Flagg, 43 Ill. 364; 92 Am. Dec. 133; Illinois Central R. R. Co. v. Sutton, 42 Ill. 438; 92 Am. Dec. 81; Porter v. New York Central R. R. Co. 31 Barb. 353; Nellis v. New York Central R. R. Co. 30 N. Y. 505; Bordeaux v. Erie R. R. Co. 8 Hun, 579; St. Louis etc R. R. Co. v. South, 43 Ill. 176; 92 Am. Dec. 103; Illinois Central R. R. Co. v. Cunningham, 67 Ill. 316; Jeffersonville etc. R. R. Co. v. Rogers, 28 Ind. 1; 96 Am. Dec. 276; S. C. 38 Ind. 116; 10 Am. Rep. 103.

4 Bordeaux v. Erie R. R. Co. 8 Hun, 579; Hoffbauer v. Delhi etc. R. R. Co. 52 Iowa, 342; 35 Am. Rep. 278; Illinois Central R. R. Co. v. Nelson, 59 Ill. 110; *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; 68 Am. Dec. 562; Chicago etc. R. R. Co. v. Flagg, 39 Ill. 364; 92 Am. Dec. 133; State v. Gould, 53 Me. 279; Crocker v. New London R. R. Co. 24 Conn. 249.

5 State v. Hungerford (1888), 39 Minn. 6.

6 White v. Chesapeake & O. R'y Co. 36 W. Va. 800.

7 Louisville etc. R. R. Co. v. Guinan, 11 Lea, 98; 47 Am. Rep. 279.

8 Du Laurans v. St. Paul etc. R. R. Co. 15 Minn. 49; 2 Am. Rep. 102; Bland v. Southern Pacific R. R. Co. 55 Cal. 570; 36 Am. Rep. 50; Freidenrich v. Baltimore & O. R. R. Co. 53 Md. 201.

9 *Texas & Pacific R'y Co. v. Bond*, 62 Tex. 442; 50 Am. Rep. 532.

10 Curl v. Chicago, R. I. etc. R'y Co. 63 Iowa, 417, sustaining a verdict of $500, as damages for expulsion in the snow between stations.

§ 878. Conductor's checks given in lieu of tickets.—A conductor's check is a full equivalent for a ticket or coupon in place of which it is given; and upon a change of conductors, if the passenger cannot produce it, he may be required to pay his fare in money.[1] But where a conductor failed to give a check in lieu of a ticket taken up by him, and the conductor succeeding him, although informed of that fact, ejected the passenger, the company was held liable.[2]

1 Jerome v. Smith, 48 Vt. 230; 21 Am. Rep. 125; Chicago etc. R. R. Co. v. Griffin, 68 Ill. 499. See, generally, upon the subject of conductors' checks, *Terre Haute etc. R. R. Co. v. McMurry*, 98 Ind. 358; 49 Am. Rep. 168.

2 Pittsburgh etc. R. R. Co. v. Henigh, 39 Ind. 509.

§ 879. Of the power of expulsion.—(*a*). **In general.**—The right of railway carriers to expel persons from their trains under certain circumstances has been made the subject of legislative action in

many of the American States; but these enactments are either merely declaratory or restrictive of the right already existing at common law,[1] which may be exercised at any suitable place or time,[2] for the purpose of maintaining the peace, or public morals, of preserving the health of other passengers,[3] and of enforcing the express or implied conditions of the contract of carriage, that the passenger shall pay for the service rendered him,[4] and observe all reasonable rules and regulations of the company.[5] The company may, of course, eject trespassers also, but even a trespasser cannot be lawfully expelled while the train is in motion.[6] In an action against a carrier for expulsion, it will not aid the plaintiff to show that his ticket was not returned.[7]

1 *Vide infra*, § 886.
2 *Vide infra*, §§ 885, 886.
3 *Vide infra*, § 880.
4 *Vide infra*, § 881.
5 *Vide infra*, § 882.
6 Mykleby v. Chicago, St. P. M. & O. R'y Co. (1888), 39 Minn. 54; Rounds v. Delaware & L. R. R. Co. 64 N. Y. 129; 21 Am. Rep. 507.
7 Wright v. California Central R'y Co. 78 Cal. 360.

§ 880. *(b)*. **Expulsion to preserve the public peace, morals and health.**—A railway carrier may eject from its cars any person committing a breach of the peace, either by actual violence or by disorderly and riotous conduct, or by the use of obscene, profane or vulgar language,[1] or if it elect so to do it may put a dangerous passenger under confinement,[2] or hand him over to the authorities of a town having accommodations sufficient to provide for him,[3] and the carrier's right thus to maintain the peace is in no wise restricted by the fact that the person committing the breach has purchased a

ticket or paid for his passage,[4] nor by the fact that he was in such a condition of intoxication when he boarded the train that the carrier might have refused to take him.[5] Ordinarily, however, a carrier, having once accepted a person as a passenger, cannot eject him upon discovery of his antecedents so long as he demeans himself in an orderly manner while on the trip.[6] Nor does the right and duty of a carrier to preserve the public morals and to protect its passengers from the machinations of the wicked, warrant it in refusing to carry, or in ejecting such persons, so long as they conduct themselves properly while upon the journey.[7] When a passenger shows symptoms justifying a belief that he is afflicted with an infectious disease, he may be expelled from the train, provided it be at a place where there is reasonable ground to believe that he can find accommodations.[8] And in the case of street railways, it is held, that a passenger may be ejected for vomiting, whereby other passengers are annoyed and disgusted.[9]

1 Peavy v. Georgia R. R. Co. (1889) — Ga. —; Louisville & N. R. R. Co. v. Logan (Ky. 1889), 5 R'y & Corp. Law J. 236, where a drunken passenger ejected for violence was killed by a later train, and the company held not liable: Railway Co. v. Yalleley, 32 Ohio St. 345, 30 Am. Rep. 601, and cases cited in brief of plaintiff in error. *Cf.* Baltimore etc. R. R. Co. v. McDonald, 68 Ind. 316, where an intoxicated person advised others not to pay.

2 King v. Ohio & M. R'y Co. 22 Fed. Rep. 413, where the passenger was about to suffer from an attack of delirium tremens: Sullivan v. Old Colony R. R. Co. (1888), 148 Mass. 119.

3 Atchison, T. & S. F. R. R. Co. v. Weber, 33 Kan. 543; 52 Am. Rep. 543.

4 Peavy v. Georgia R. R. Co. (1889), —Ga.— construing Ga. Code, § 4586 a.

5 Louisville & N. R. R. Co. v. Logan (Ky. 1889), 5 R'y & Corp. Law J. 236.

6 *Pearson v. Duane*, 4 Wall. 605; S. C. Thompson on Carriers, 17, where a person returning to a place whence he had been exiled by a vigilance committee, was held entitled to recover for an ejection from a ship.

7 *Brown v. Memphis etc. R. R. Co.* 7 Fed. Rep. 51; S. C. 5 Fed. Rep. 499; S. C. 4 Fed. Rep. 37.

8 Paddock v. Atchison, T. & S. F. R. R. Co. 37 Fed. Rep. 841.
9 Lemont v. Washington etc. R. R. Co. 1 Mackay (D. C.) 180; 46 Am. Rep. 238.

§ 881. (c). **Expulsion for refusal to pay or to present a ticket.**—The right of carriers by rail to eject from their trains any passenger failing to show a ticket, or to pay the fare demanded in lieu thereof, is well established, both at common law[1] and under the statutes of many of the American States.[2] Thus, it has been held that the servants of the company may expel a person who refuses to make restitution of money paid him by the conductor beyond the amount of change to which he was entitled;[3] or who, having innocently bought a ticket with counterfeit money, refuses to rectify the wrong on being informed thereof;[4] or who, having paid his own fare, refuses to pay for a child under his charge;[5] or who, having a ticket for a station at which the train does not stop, refuses to pay to the nearest point before or beyond, at which it does stop;[6] or who refuses to pay after the rejection of a ticket that had already been punched,[7] or which he had purchased from another company whose authority to act as its agent is denied by the carrier;[8] or who delays to pay on the ground that he has not yet determined how far he will go.[9] And a company may rightfully eject from a particular car, a passenger who refuses to pay an additional charge made for riding therein.[10] But the company will be liable for the ejection of a passenger, who, having once paid his fare, refuses to pay again upon the conductor demanding it a second time;[11] or for the summary ejection of a passenger who requests a reasonable time wherein to procure

the money to pay for his passage;[12] or for ejecting a father accompanying a son more than twenty-one years of age, because of the latter having sold a non-transferable ticket while using it on a trip.[13] In a recent case, a sufficient cause of action for damages was held to be stated by a complaint alleging in substance that the plaintiff offered to deposit money to the value of the ticket with the conductor, to be returned if the misplaced ticket should be produced; and that upon the conductor's refusal to accept it, the plaintiff made an unconditional tender of the money, which also was refused, and that the plaintiff was thereupon ejected.[14] In another case, where a person inexperienced in traveling, aged and partly paralyzed, being unable to produce his ticket, requested the conductor to take it out of a certain pocket, and the conductor, not finding it there after a careless search, ejected him from the train, the company was held liable in exemplary damages.[15] So, again, a person ejected from a train because the return-coupon of his ticket had been punched by mistake by the conductor to whom he first presented his ticket, and whose indorsement of the fact of the mistake was not recognized by a subsequent conductor, and because he refused to pay any additional fare, has been held entitled to an action against the company for breach of contract, and also to an action of trespass *vi et armis*, but not to exemplary damages, as no malice was shown.[16] In an action against a railway company to recover for a wrongful ejection, the defendant cannot introduce evidence to show that the plaintiff had made previous attempts to evade paying for his passage.[17]

1 *Vide supra*, §§ 876, 877; Jardine v. Cornell (1888), 50 N. J. 435; Tarbell v. Central Pacific R. R. Co. 34 Cal. 616; Pittsburgh etc. R. R. Co. v. Van Hauten, 48 Ind. 9; Stone v. Chicago etc. R. R. Co. 47 Iowa, 85; 29 Am. Rep. 456; Bennett v. New York Central R. R. Co. 5 Hun (N. Y.), 569, affirmed 69 N. Y. 594; 35 Am. Rep. 250; Swan v. Manchester etc. R. R. Co. 132 Mass. 116; 42 Am. Rep. 432. *Cf.* Shular v. St. Louis, I. M. & S. R. R. Co. 92 Mo. 339.

2 *Vide infra*, § 886, notes 1 and 2.

3 McCarthy v. Chicago etc. R. R. Co. 41 Iowa, 432.

4 Memphis etc. R. R. Co. v. Chastine, 54 Miss. 503.

5 *Philadelphia, W. etc. R. R. Co. v. Hoeflich*, 63 Md. 300; 50 Am. Rep. 223.

6 Atchison, T. & S. F. R. R. Co. v. Gants (1888), 38 Kan. 608; Lake Shore etc. R. R. Co. v. Pierce, 47 Mich. 277.

7 Terre Haute etc. R. R. Co. v. Vanatta, 21 Ill. 188; 74 Am. Dec. 96; Chicago etc. R. R. Co. v. Peacock, 48 Ill. 253.

8 Pennsylvania R. R. Co. v. Connell, 112 Ill. 295; 54 Am. Rep. 238.

9 Fulton v. Grand Trunk R. R. Co. 17 Up. Can. Q. B. 428.

10 Wright v. California Central R'y Co. 73 Cal. 370, where the plaintiff had his choice between leaving the train or going into a first-class passenger car, and choosing the former alternative, it was held that the trial court was not required to submit to the jury whether the regulation was public, reasonable and uniform in its operation.

11 Indianapolis etc. R. R. Co. v. Mulligan, 50 Ind. 392.

12 Clark v. Wilmington & W. R. R. Co. 91 N. C. 506; 49 Am. Rep. 647.

13 Louisville & N. R. R. Co. v. Maybin (1889), — Miss. —.

14 Knowles v. Norfolk, S. R. R. Co. (1889) 102 N. C. 59.

15 Louisville & N. R. R. Co. v. Fleming, 14 Lea, 128.

16 Philadelphia, W. etc. R. R. Co. v. Rice, 64 Md. 63.

17 English v. Delaware etc. Canal Co. 4 Hun, 683; aff'd, 66 N. Y. 454; 23 Am. Rep. 69.

§ 882. (*d*). **Expulsion for violation of rules and regulations.**—A passenger may be expelled from the cars of a railway company for violating any of its reasonable rules and regulations.[1] Thus, "where the rules of the company require all passengers to purchase a ticket before entering the cars, and forbid the conductors from taking money for fares, a passenger who neglects to supply himself with a ticket may be removed from the car, although he tenders his fare in money."[2] While it has been doubted whether an ineffectual attempt by the passenger to obtain a ticket will entitle

him to remain against a positive rule of the carrier, yet evidence of the fact is admissible to show his good faith in disregarding the rule, and as part of the *res gestæ*.[3] And certainly the enforcement of such a regulation will depend upon the carrier having afforded an opportunity for the purchase of tickets.[4] Other illustrations of the carrier's right to eject persons violating its reasonable rules and regulations, are to be found in cases where attempts have been made to ride on locomotives, freight trains, baggage-cars, *et cetera*.[5] It is essential, however, to the legality of an ejection for violation of the company's rules and regulations, that they be public, reasonable and uniform in their operation.[6] The Civil Code of California requires railroad companies to have conspicuously posted in their cars their rules regarding fares and the conduct of passengers.[7] A complaint by a passenger against a railroad company for damages for wrongfully ejecting him from the train, need not allege that, at the time of his expulsion, he was complying with all the reasonable rules of the company, nor that he was not about to violate any such rule.[8] But if the declaration charges that he was lawfully riding on the train as a passenger, and that the conductor unlawfully put him off, and his evidence is to the effect that he was riding on a freight train without a proper permit from the superintendent, as required by a rule of the company, on account of the fault of the station agent, the variance is fatal.[9]

1 *Vide* cases cited *supra*, §§ 860, 861.

2 Wood's Railway Law, 1430, citing McCarthy v. Dublin etc. R'y Co. 5 Ir. Rep. C. L. 244; Lane v. East Tennessee R. R. Co. 5 Lea (Tenn.), 124.

3 Perkins v. Missouri etc. R. R. Co. 55 Mo. 201; Wood's Railway Law, 1431.

4 *Vide supra*, § 877, and cases there cited.

5 *Vide supra*, §§ 857, 861. See, also, Thomas v. Chicago & G. T. R'y Co. (1888), — Mich. —, where the passenger attempted to ride on a ticket "good going on any train;" but it held that he might nevertheless be ejected from a freight train.

6 See cases cited *supra*, § 860; Chicago, St. L. & P. R. R. Co. v. Holdridge, 118 Ind. 281, where damages were awarded for an ejection for violation of a rule unknown to the passenger and the general public. *Cf.* Wright v. California Central R'y Co. (1889) 78 Cal. 360.

7 Cal. Civ. Code, § 484.

8 South Florida R. R. Co. v. Rhoads (Fla. 1889), 37 Am. & Eng. R. R. Cas. 100.

9 Thomas v. Chicago & G. T. R'y Co. (1888) — Mich. —

§ 883. (*e*). **Expulsion for breach of the contract of carriage.**—Another valid ground for the ejection of passengers is their failure or refusal to comply with the terms or conditions of the contract of carriage; as, for example, in stopping over at an intermediate point without permission from the company's agents,[1] detaching coupons from a non-detachable coupon ticket,[2] or in attempting to ride after the expiration of a limited ticket.[3]

1 *Vide supra*, § 872, and cases there cited. See, also, other examples noted in § 870, *supra*,

2 *Vide supra*, § 874, and cases there cited.

3 *Vide supra*, § 871, and cases there cited.

§ 884. **Of tender after refusal to pay—Resumption of journey.**—Ordinarily a tender of the money by a person about to be ejected for at first refusing to pay his fare, or an offer to pay made by another person in his behalf,[1] must be accepted by the conductor, if it be made before he has actually expelled him from the train; provided the circumstances are such that the person is not a mere trespasser; but if he be a trespasser, or has been captious, vexatious, disorderly, violent or abusive in his refusal to pay, the conductor is under no obli-

gation to accept a tender made after the train has been stopped or the signal to stop has been given.[2] Thus, an expulsion from the train was justified, where the passenger declined to pay the fare, threatened to sue the company if put off, and then tendered his fare while he was being ejected by the conductor after the stoppage of the train.[3] Even where there were no vexatious circumstances, a tender will not avail after the passenger has been put off and the train has begun to move.[4] A person seeking to resume his journey from the place at which he was ejected must pay from the point at which he first took passage.[5] The carrier is not bound to receive, however, a person who has just been ejected for good cause; such, for example, as a refusal to pay for his passage.[6]

1 O'Brien v. New York Central R. R. Co. 80 N. Y. 236; Garrett v. Louisville etc. R. R. Co. 8 Lea, 438; South Carolina R. R. Co. v. Nix, 68 Ga. 572.

2 Gould v. Chicago etc. R. R. Co. 18 Fed. Rep. 155; O'Brien v. New York Central R. R. Co. 80 N. Y. 236; Nelson v. Long Island R. R. Co. 7 Hun, 140; Hoffbauer v. Delhi etc. R. R. Co. 52 Iowa, 342; 35 Am. Rep. 278; Louisville etc. R. R. Co. v. Harris, 9 Lea, 180; 42 Am. Rep. 668; Thomas v. Geldart, 4 P. & B. (N. B.) 95; Shedd v. Troy etc. R. R. Co. 40 Vt. 88; Wentz v. Erie R. R. Co. 3 Hun, 241; Boston etc. R. R. Co. v. Proctor, 1 Allen, 267; Lillis v. St. Louis etc. R. R. Co. 64 Mo. 464; Sherman v. Chicago etc. R. R. Co. 40 Iowa, 45; Powell v. Pittsburgh etc. R. R. Co. 25 Ohio St. 70; Farwell v. Grand Trunk R'y Co. 15 Up. Can. Com. P. 427; Briggs v. Grand Trunk R'y Co. 24 Up. Can. Q. B. 570; Fulton v. Grand Trunk R'y Co. 17 Up. Can. Q. B. 423.

3 Pease v. Delaware L. & W. R. R. Co. 101 N. Y. 367; S. C. 11 Daly, 350.

4 South Carolina R. R. Co. v. Nix, 68 Ga. 572.

5 Stone v. Chicago etc. R. R. Co. 47 Iowa, 82; 29 Am. Rep. 458; State v. Campbell, 33 N. J. 309; Swan v. Manchester etc. R. R. Co. 132 Mass. 116; 42 Am. Rep. 432; *O'Brien v. Boston & W. R. R. Co.* 15 Gray, 20; 77 Am. Dec. 347; O'Brien v. New York Central R. R. Co. 80 N. Y. 236; Nelson v. Long Island R. R. Co. 7 Hun, 140.

6 *O'Brien v. Boston & W. R. R. Co.* (1860) 15 Gray 20; 77 Am. Dec. 347; S. C. Thompson on Carriers, 22.

§ 885. Of the place of expulsion—At common law.—At common law the suitableness of the place for the expulsion of a passenger is a question of

fact for the jury to determine,[1] taking into consideration the sex and age of the passenger,[2] his mental and physical condition;[3] together with the time before the arrival of another train, as bearing upon the probability of his being injured thereby;[4] also the inclemency of the weather,[5] and the unseasonableness of the hour,[6] as bearing upon the probability of his reaching a place of refuge without injury to his health.[7]

1 Brown v. Chicago etc. R. R. Co. 51 Iowa, 235; Toledo etc. R. R. Co. v. Brown, 63 Ind. 586; Chicago etc. R. R. Co. v. Loyer, 1 Bradw. (Ill.) 472; Jeffersonville R. R. Co. v. Rogers, 23 Ind. 1; 92 Am. Dec. 276; 38 Ind. 116; 10 Am. Rep. 103; *Chicago, Burlington & Q. R. R. Co. v. Parks*, 18 Ill. 460; 68 Am. Dec. 562; S. C. Thompson on Carriers, 319.

2 Illinois Central R. R. Co. v. Latimer (1888), -- Ill. —, where the passenger was but six years of age.

3 As, for example, his intoxication: Louisville etc. R. R. Co. v. Sullivan, 81 Ky. 624; 50 Am. Rep. 183; Van Kirk v. Pennsylvania R. R. Co. 76 Pa. St. 66; 18 Am. Rep. 404; Galena v. Hot Springs R. R. Co. 13 Fed. Rep. 116.

4 Illinois Central R. R. Co. v. Latimer (1889), — Ill. —, and cases in preceding note.

5 Hall v. South Carolina R'y Co. (1888) 28 S. C. 261.

6 Hall v. South Carolina R'y Co. (1888) 23 S. C. 261.

7 Hall v. South Carolina R'y Co. (1888) 28 S. C. 261.

§ 886. **Of the place of expulsion—Statutory regulations.**—With respect to the place at which passengers may be ejected, the New York General Railroad Act of 1850 provides that, "If any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train, and the servants of the corporation, to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping-place, or near any dwelling-house, as the conductor may elect, on stopping the train."[1] Similar enactments are in force in many of the States.[2] But statutes prohibiting expulsion, except at certain places, for

non-payment of fare, do not apply to expelling persons for other reasons, such as for violation of the rules of the company.[3] In Arkansas and Texas, these enactments are held to be restrictive upon the common-law right of a carrier to eject passengers at any suitable place;[4] while a similar act in Illinois is considered to be merely permissive.[5] The words "regular station," as used in the Illinois act, are construed to mean "the place on the railroad where passenger trains usually stop for the purpose of having passengers get on and off," and not the town or village in which the depot building is situated.[6] The provision of the California code, requiring the expulsion to be at any "usual stopping-place or dwelling-house," is sufficiently complied with by an ejection at a small town where the train stopped.[7] A "passenger station," within the meaning of the New Hampshire prohibition, is a stopping-place at which passenger tickets are ordinarily sold.[8]

1 N. Y. Laws of 1850, ch. 140, § 35.

2 Fla. Laws, ch. 1987, § 41; Ark. Act of July 23, 1868 (Mansf. Dig. § 5474); N. H. Gen. Laws, ch. 163, § 22; Ill. Rev. Stat. ch. 114, § 94; Cal. Civ. Code, § 487; Toledo etc. R. R. Co. v. Wright, 68 Ind. 586; 34 Am. Rep. 277; Texas etc. R. R. Co. v. Casey, 52 Texas, 112.

3 South Florida R. R. Co. v. Rhodes (Fla. 1889), 37 Am. & Eng. R. R. Cas. 100; Hobbs v. Texas & P. R'y Co. (1887) 49 Ark. 357.

4 St. Louis I. M. etc. R'y Co. v. Branch, 45 Ark. 524; Texas etc. R. R. Co. v. Casey, 52 Texas, 112, where an ejection at a wood-and-water station was held to violate the statute.

5 Toledo etc. R. R. Co. v. Wright, 68 Ind. 586; 34 Am. Rep. 277.

6 Illinois Central R. R. Co. v. Latimer (1889), — Ill. —.

7 Wright v. California Central R'y Co. 73 Cal. 370.

8 Baldwin v. Grand Trunk R'y Co. (1888) 64 N. H. 496.

§ 887. Damages for wrongful expulsion of passengers.—For a wrongful expulsion of a passenger from its cars or train, a railway company may be held liable in an action either upon the contract of

carriage, or in tort. The remedy of a person not a passenger is by an action in tort.[1] It will be no defense to an action against it for a wrongful expulsion that its conductor was honestly mistaken;[2] nor that the passenger was ejected by a lessee of the company from a train owned and operated by the lessee;[3] nor that he was ejected by order of the fare collector of an entirely independent company operating a bridge over which the railway's cars were run;[4] nor that no undue violence was exerted in the wrongful expulsion of a passenger;[5] although this would avail as a defense in an action for the lawful expulsion of persons standing in the position of trespassers.[6]

1 Mykleby v. Chicago, St. P. M. & O. R'y Co. (1888), 39 Minn. 54.
2 Graham v. Pacific R. R. Co. 66 Mo. 536; Quigley v. Central Pacific R. R. Co. 11 Nev. 350; 21 Am. Rep. 757.
3 East Line etc. R. R. Co. v. Lee (1888), 70 Tex. 496.
4 Union Railway & T. Co. v. Kallaher, 114 Ill. 325.
5 Graham v. Pacific R. R. Co. 66 Mo. 536.
6 Terry v. Flushing etc. R. R. Co. 13 Hun, 359.

§ 888. Damages for unnecessary violence in expulsion of passengers or trespassers.—Even where a railway company has a legal right to eject either a passenger or a trespasser from its train, it may yet be held answerable in an action in tort for the manner in which its servants exercise the power. Thus, to force a person from a train while it is in motion is a flagrant abuse of power, for which the company will be liable whether the person so ejected were a passenger or a trespasser.[1] And if the servants of the company,[2] or passengers whose assistance is accepted by the conductor or train-men,[3] or a policeman acting *pro tempore* as agent of the company,[4] exercise more force than is

necessary to overcome the reluctance or resistance of the person ejected, the company is liable for any injury directly resulting therefrom.[5] And it cannot plead by way of defense, that in using unnecessary force its servants exceeded their authority, if they were acting within the general scope of their authority in ejecting the passenger.[6] The plaintiff should set forth in his complaint the facts showing that unnecessary force was employed.[7] It is a question for the jury whether the force used was unnecessarily violent, and whether the injuries were wantonly or maliciously inflicted.[8] In an action in tort, for injuries received in being ejected from a train, the question of contributory negligence does not enter into the case, for contributory negligence is no palliation of an intentional wrong.[9] And where the action is one in tort, the plaintiff's failure to prove his allegation that he was a passenger is not a material variance.[10]

1 East Line etc. R. R. Co. v. Lee (1888), 70 Tex. 496; Mykleby v. Chicago, St. P., M. & O. R'y Co. (1888) 39 Minn. 54; Rounds v. Delaware & L. R. R. Co. 64 N. Y. 129; 21 Am. Rep. 597.

2 Cain v. Minneapolis & St. L. R'y Co. (1888) 39 Minn. 297.

3 Atchison, T. & S. F. R. Co. v. Gants (1888), 38 Kan. 608.

4 Jardine v. Cornell (1888), 50 N. J. 485.

5 Pennsylvania R. R. Co. v. Connell (1889), 26 Ill. App. 594; Jardine v. Connell (1888), 50 N. J. 485; Chicago, St. L. etc. R. R. Co. v. Bills, 104 Ind. 13; Western & A. R. R. Co. v. Turner, 72 Ga. 292; 53 Am. Rep. 842; Chicago, Rock Island etc. R'y Co. v. Barrett, 16 Ill. App. 17; Hicks v. Hannibal etc. R. R. Co. 68 Mo. 329; Quigley v. Central Pacific R. R. Co. 11 Nev. 350; 21 Am. Rep. 757; Galena v. Hot Springs R. R. Co. 13 Fed. Rep. 116; State v. Ross, 26 N. J. 224; Coleman v. New York etc. R. R. Co. 106 Mass. 160; Great Western R. R. Co. v. Miller, 19 Mich. 305; Bass v. Chicago etc. R. R. Co. 39 Wis. 636; 36 Wis. 450; 17 Am. Rep. 495; Lake Shore etc. R. R. Co. v. Pierce, 47 Mich. 277; Shelton v. Lake Shore etc. R. R. Co. 29 Ohio St. 219.

6 Bass v. Chicago etc. R. R. Co. 42 Wis. 654; 24 Am. Rep. 437.

7 Chicago, St. L. etc. R. R. Co. v. Bills, 104 Ind. 13.

8 Pennsylvania R. R. Co. v. Connell (1889), 26 Ill. App. 594.

9 Chicago, St. L. etc. R. R. Co. v. Bills, 118 Ind. 221.

10 Mykleby v. Chicago, St. P., M. & O. R'y Co. (1888) 39 Minn. 54.

§ 889. The same subject, continued and illustrated.—In a recent case, there was evidence that the conductor told the passenger to pay his fare, or he would "bounce" him from the train; that, assisted by the brakeman, he pulled him rather violently to the door of the car, in pushing him through which, the arm of the passenger was hurt; that when the latter, in going down the steps, which were icy, caught hold of the railing, the brakeman broke his hold, and that, as a result of such action, the passenger received considerable injuries. It was held, that a finding of the jury that the force used in ejecting the passenger was willful or wanton would not be disturbed.[1] Where a person is removed from a railroad train with the assistance of some of the passengers, and willful, wanton, and malicious force is used by them, the railroad company may be liable therefor, although no express directions were given by the conductor or trainmen to the passengers; but not if the passengers are interlopers, and the conductor and train-men have no opportunity to interfere.[2] So, also, a police officer, who responds to an invitation of the carrier's regular agents to assist in ejecting a passenger, thereupon becomes a special agent of the company, and it will be liable for his excessive violence in executing its regulations. But if the policeman arrest the passenger for his disorderly conduct, and carry him by force to a police station, it will be presumed that he did so in his own official capacity, although his aid had been originally rendered as a special agent of the company. Accordingly, the company is not liable for the policeman's violence in making the arrest.[3]

1 Pennsylvania R. R. Co. v. Connell, 118 Ill. 221.
2 Atchison, T. & S. F. R. R. Co. v. Gants (1888), 38 Kan. 608.
3 Jardine v. Cornell (1888), 50 N. J. 485.

§ 890. **Elements of damages.**—The measure of damages in an ordinary case of wrongful expulsion, without unnecessary violence or insult, and from which no bodily injury results, is the cost of a ticket from the point of expulsion to the passenger's destination, together with an allowance for such damages as actually result from loss of time.[1] But if undue violence was exerted,[2] or the expulsion was accompanied by insult,[3] or the circumstances were such that the carrier's act resulted in the death of the person ejected,[4] or in injury to his health, these facts are to be considered in estimating the damages to be awarded.[5] Thus, where a person was ejected in such a manner as to be disabled by the train from which he was expelled, and, in consequence, was killed by a subsequent train, the company was held liable for his death, whether it was caused by the first or the second train.[6] The fact that the passenger obeyed the conductor's wrongful command to leave the train or pay his fare, so that no force was used in expelling him, does not diminish the damages which he may recover for the wrongful ejection and injuries to his health resulting therefrom.[7] But no recovery can be had for damages so remote as those resulting from exposure while the ejected person was attempting to reach his destination on foot, when he had been put off at or near a village where he might have found shelter.[8] The declaration must allege that the injuries resulting from the ejection were caused by the defendant's act. Thus, an al-

legation that "in consequence of her wrongful expulsion . . . and of her walk to B. in order to reach her home," the plaintiff suffered the injuries complained of, is not sufficient to render the company liable for the result of the walk; but an allegation that the plaintiff walked to B., her home, there being *no other way* or means of reaching there, is a sufficient allegation that the injuries resulted from the defendant's act.[9] The burden of proving that the injury was the result of the defendant's act is upon the plaintiff; accordingly a charge that, if plaintiff's sickness was not the result of being ejected, and that if it were reasonably certain to have resulted from other causes, defendant is not liable, has been held to be erroneous, as throwing the burden upon the defendant to show that the sickness was not the result of the exposure, and requiring proof beyond reasonable doubt.[10]

1 Pennsylvania v. Connell, 118 Ill. 221; Pittsburgh etc. R. R. Co. v. Slusser, 19 Ohio St. 157; Hicks v. Hannibal etc. R. R. Co. 68 Mo. 329. *Cf. Pearson v. Duane* (1866), 4 Wall. 605; S. C. Thompson on Carriers, 17. As to what should be included in compensatory damages, see further note to Pennsylvania R. R. Co. v. Books, 98 Am. Dec. 229. See, also, Matthews v. Warner, 29 Gratt. 570; 26 Am. Rep. 396; Borland v. Barrett, 76 Va. 128; 44 Am. Rep. 152; Smith v. Bagwell, 19 Fla. 117; 45 Am. Rep. 12.

2 *Vide supra*, §§ 888 and 889.

3 *Vide infra*, § 891.

4 South Carolina R. R. Co. v. Nix, 68 Ga. 572, cited *infra*.

5 Pennsylvania R. R. Co. v. Connell (1889), 26 Ill. App. 594; St. Louis A. & T. R'y Co. v. Burns, 71 Tex. 479; Yorton v. Milwaukee, L. S. etc. R'y Co. 62 Wis. 367.

6 South Carolina R. R. Co. v. Nix, 68 Ga. 572.

7 Yorton v. Milwaukee, L. S. etc. R'y Co. 62 Wis. 367. *Cf. The Georgia Railroad v. Homer*, 73 Ga. 251.

8 Louisville & N. R. R. Co. v. Fleming, 14 Lea, 128.

9 Spicer v. Lynn & B. R. R. Co. (1889) 149 Mass. 207.

10 St. Louis, A. & T. R'y Co. v. Burns, 71 Tex. 479.

§ 891. Mental suffering, shame and humiliation as elements of damage.—When a passenger

is wrongfully compelled to leave a train, and suffers insult and abuse in connection with his expulsion, while the law does not exactly measure his damage, yet it does authorize the jury to consider the injured feelings of the plaintiff, the indignity endured, his mental suffering, the humiliation and wounded pride,[1] which one in his condition in life and standing in the community would experience,[2] and to award him compensatory damages therefor.[3] Even punitive damages may be required of the company in certain aggravated cases.[4] A public announcement to the other passengers that the plaintiff had refused to pay his fare has been held to be sufficient evidence of shame and humiliation.[5]

1 Shepard v. Chicago, R. I. & P. R'y Co. (1889) — Iowa, —; Pennsylvania R. R. Co. v. Connell (1889), 23 Ill. App. 594; Baltimore & O. R. R. Co. v Bambrey (1888) — Pa. St. —; Randolph v. Hannibal & S. J. R. R. Co. 18 Mo. App. 60.; Hicks v. Hannibal etc. R. R. Co. 68 Mo. 329; Chicago etc. R. R. Co v. Flagg, 43 Ill. 364, 368; 92 Am. Dec. 133; Delaware, L. & W. R. R. Co. v. Walsh, 47 N. J. 543; Lake Erie etc. R'y Co. v. Fix, 88 Ind. 381; 45 Am. Rep. 461; Hays v. Houston etc. R. R. Co. 46 Tex. 272; Smith v. Pittsburg etc. R'y Co. 23 Ohio St. 10; Allen v. Camden & P. etc. Ferry Co. 46 N J. 198; Quigley v. Central Pacific R. R. Co. 11 Nev. 350; 21 Am. Rep. 757 *Contra*, Illinois etc. R. R. Co. v. Sutton, 53 Ill. 397.

2 Hays v. Houston etc. R. R. Co. 46 Tex. 272; Chicago etc. R. R. Co. v. Bryan, 90 Ill. 126; The Georgia Railroad v. Homer, 73 Ga. 251, 256, holding, however, that evidence of the wealth of the company was improperly admitted to the jury, which is "disposed enough ordinarily to find against railroad corporations."

3 Shepard v. Chicago, R. I. & P. R'y Co. (1889) — Iowa, —; Randolph v. Hannibal & S. J. R. R. Co. 18 Mo. App. 609; and cases cited in the preceding notes.

4 *Vide infra*, § 893.

5 Chicago etc. R. R. Co. v. Chisholm, 79 Ill. 584; Chicago etc. R. R. Co. v. Williams, 55 Ill. 185; 8 Am. Rep. 641.

§ 892. **Of the quantum of damages.**—The *quantum* of damages in an action for expulsion is so largely within the discretion of the jury, that, unless the amount awarded is so large as to show prejudice, passion or corruption on the part of the

jury, the court will not readily grant a new trial.[1] Thus a verdict of seven thousand dollars as damages for permanent injuries resulting to a professional man, and a sickness whereby he was prevented from attending to his practice as before the ejection, was considered in a late case not to be so large as to require a reversal.[2] Again, an ejection with abuse and violence, between stations, at night and in cold weather, has been held to justify a verdict of seven hundred dollars.[3] And five hundred and sixty-two dollars was sustained as a proper allowance for an ejection with violence and profane abuse.[4] In another case a verdict for five hundred dollars was held not to be excessive, where the plaintiff, although not seriously injured, was taken by the shoulder, and ejected from the train while in motion, whereby he was considerably bruised and unable to work for a week.[5] But where the ejection was without violence, and the inconvenience to the passenger was trifling, and the conductor was honestly mistaken, a verdict of fifty pounds was held to be excessive.[6]

1 Bass v. Chicago etc. R. R. Co. 42 Wis. 654.

2 Pennsylvania R. R. Co. v. Connell (1889), 26 Ill. App. 594.

3 Indianapolis etc. R. R. Co. v. Milligan, 50 Ind. 392.

4 St. Louis etc. R. R. Co. v. Myrtle, 51 Ind. 566.

5 East Line etc. R. R. Co. v. Lee (1888), 70 Tex. 496.

6 Huntsman v. Great Western R'y Co. 20 Up. Can. Q. B. 24; Davis v. Great Western R'y Co. 20 Up. Can. Q. B. 27.

§ 893. Of punitive, exemplary, vindictive, or added damages.—It is only when the action against a railway carrier for a wrongful expulsion is founded in tort, that punitive or exemplary damages may be exacted of the defendant.[1] But an allegation in the complaint as to the existence of a

contract does not necessarily characterize the action as one brought upon breach thereof, where there are other allegations of wrong and violence; and if the facts are such as to warrant punitive damages, they may be imposed, notwithstanding the allegation of a contract.[2] And if the denial in the answer be so expressed as to show that the allegations of the complaint are construed by the defendant to imply a charge of rudeness on the part of the conductor, the doctrine of aider by answer applies, and punitive damages for the insult, if proven, may be awarded under the pleadings.[3] Questions concerning punitive damages against a railway company for torts committed by its servants in connection with the expulsion of passengers, are to be determined by the general rules of law applicable in similar actions against private persons; and if the circumstances be such that punitive damages could not be imposed upon the servant committing the wrongful act, neither can the company be held liable therefor.[4] In a comparatively recent decision, the general rule of law applicable to cases in which punitive damages are sought is clearly stated. "It is of little consequence," said the court, "by what name the damages given are called, provided the case is one involving that class of injuries for which the plaintiff is entitled to recover; they may be called 'exemplary,' 'punitory,' 'vindictive,' 'compensatory,' or 'added' damages. The important question always is, in every case, was the character of the wrong suffered, or injury sustained, such as may be lawfully atoned for or compensated in money? Actual damages are those which the injured party is entitled to recover for

wrongs received and injuries done when none were intended. Damages beyond these, where the injuries and sufferings were intended, or occurred through carelessness or negligence amounting to a wrong so reckless and wanton as to be without palliation or excuse, are frequently and properly given, and have been variously designated by the terms above mentioned. The first are measured by known and well-defined rules. No rule can be laid down, properly measuring or limiting the damages allowable in the other class of cases, except that they must not be oppressive, or such as to shock the common sense of fair-minded men; and they are therefore left to the reasonable discretion of the jury. A more definite rule cannot well be given as to these, as what would be right and just must depend entirely upon the circumstances of each particular case."[5]

1 Head v. Georgia Pacific R'y Co. (1888) 79 Ga. 358. This subject will, accordingly be more appropriately treated in connection with injuries to passengers in general, *q. v.*

2 Head v. Georgia Pacific R'y Co. (1888) 79 Ga. 358.

3 Knowles v. Norfolk S. R. R. Co. (1889) 102 N. C. 59.

4 Parker v. Long Island R. R. Co. 13 Hun, 319.

5 Ross v. Leggett, 61 Mich. 445; 1 Am. Rep. 608, 615.

§ 894. The same subject, continued.—Exemplary damages have been awarded in an action for wrongful expulsion, where abusive language was used toward a woman, and her little girl was taken up and carried from the train, thereby compelling the mother to follow, the evidence showing that the weather was cold, and that sickness resulted therefrom.[1] In another case, where the passenger was abused and insulted by the conductor, who had been informed that he had sold his ticket, which

was not transferable, and, without being given reasonable time to produce his ticket, was required to leave the train.[2] And again, in a case of wrongful expulsion, it was held error to instruct the jury that actual damages only could be recovered, where the facts showed that the weather was rough, and that although the passenger might have been put off near his home, he was expelled at the next station, which was closed.[3] In a recent case in Florida, under instructions that if the passenger was violating no reasonable rule he was entitled to recover damages, either compensatory or exemplary, and that he could only recover exemplary damages for acts accompanied with maliciousness or willful wrong, and not for injuries received by reason of his own violent resistance, it was held that exemplary damages could not be awarded, since it appeared in evidence that the company had established a rule prohibiting the employees of a rival steamship line from wearing their uniform on the cars of the company; that plaintiff bought a ticket and went upon the cars, expecting and hoping to be expelled, for the purpose of instituting an action for damages, and that he was expelled, only such force, however, being used as was necessary to overcome his violent resistance, and although he was compelled to walk about four miles to a station, it was held that a verdict of five thousand dollars in his favor should have been set aside.[4]

1 Hicks v. Hannibal etc. R. R. Co. 68 Mo. 329.

2 Louisville & N. R. R. Co. v. Maybin (1889), — Miss. —

3 Hall v. South Carolina R. R. Co. (1888) 28 S. C. 261

4 South Florida R. R. Co. v. Rhodes (Fla. 1889), 37 Am. & Eng. R. R. Cas. 100.

§ 895. **Punitive damages for expulsion without violence or insult.**—Punitive damages may be awarded for the illegal expulsion of a passenger even though actual force was not employed.[1] In the case last cited, it was said by the court, that the passenger loses nothing by not resisting and not requiring force to eject him. On the contrary, he is right to yield to authority and throw himself for redress upon the law. "Of course, rude and violent conduct would be a circumstance to demand increase of damages against the company, but more than actual damage is recoverable for the act of putting off by the mere moral force of authority."[2] But exemplary damages are not recoverable by a passenger tendering a first-class ticket, for a civil removal to an inferior car, where men unaccompanied by women are required by the rules of the company to ride.[3]

1 *The Georgia Railroad v. Homer*, 73 Ga. 251.

2 *The Georgia Railroad v. Homer*, 73 Ga. 251, 257.

3 Holmes v. Carolina Central R. R. Co. 94 N. C. 318. *Cf.* cases in point cited in § 855, *supra*.

§ 896. **Mitigation of damages.**—Where a passenger offers a ticket, as to the validity of which there may be a reasonable dispute, and which the conductor refuses, and the passenger, although able to do so, yet obstinately declines to pay the additional fare demanded, and insists upon being ejected from the train, such fact should be considered by the jury by way of mitigation of damages, and no compensation should be allowed for wounded feelings, even though the conductor proves to have been mistaken.[1] And the company may introduce evidence, such as the subsequent declarations of

the plaintiff, to show that his object in bringing about the expulsion was to make money by suing the company,[2] or to test the legality of its rules.[3] The defendant may show, also, that all the plaintiff's injuries were the result of his resistance, and that no more force was used in expelling him than the passenger himself rendered necessary.[4] Again, in mitigation of exemplary damages for its servants carrying weapons, the company may show that on previous occasions the train had been boarded in that vicinity by desperadoes.[5]

1 Hall v. Memphis & C. R. R. Co. 15 Fed. Rep. 57; S. C. 9 Fed. Rep. 585; Gibson v. East Tennessee, V. & G. R. R. Co. 30 Fed. Rep. 904.

2 Cincinnati etc. R. R. Co. v. Cole, 29 Ohio St. 126; 23 Am. Rep. 729, where the passenger knew that the company had been charging illegal rates and expected to profit thereby.

3 South Florida R. R. Co. v. Rhoads (Fla. 1889), 37 Am. & Eng. R. R. Cas. 100.

4 Wright v. California Central R'y Co. 78 Cal. 370; Atchison, T. & S. F. R. R. Co. v. Gants (1888), 38 Kan. 608.

5 Chicago etc. R. R. Co. v. Boger, 1 Bradw. (Ill.) 472.

CHAPTER XXXV.

OF BAGGAGE.

§ 897. General considerations.
§ 898. Of the beginning of the carrier's liability for baggage.
§ 899. The word "baggage" defined and illustrated.
§ 900. The same subject, continued.
§ 901. Of money as baggage.
§ 902. Knowledge of contents as affecting liability of carrier.
§ 903. The limit of weight and value—Extra compensation.
§ 904. Of baggage checks—Connecting carriers.
§ 905. Liability of connecting carriers—The initial carrier.
§ 906. The same subject, continued—The intermediate and terminal carriers.
§ 907. Of the passenger's retention of custody.
§ 908. Liability of sleeping-car companies for passengers' effects.
§ 909. The same subject, continued.
§ 910. The carrier's liability for delay in delivery of baggage—Measure of damages—Exemplary damages.
§ 911. Of notices and stipulations as affecting liability for baggage.
§ 912. Of the termination of the carrier's liability for baggage.

§ 897. General considerations.—The earlier cases, in the law of common carriers, held that they were not insurers with respect to the personal effects or luggage of their passengers, and that no liability attached to them for its loss or injury, unless a distinct price was paid for its transportation.[1] The modern rule, however, is that the contract to carry the passenger himself, does, without additional compensation, render the company liable for the safe and prompt transportation of such of his effects as may be necessary to his personal use and convenience on the journey;[2] and the burden

is upon the carrier to prove that any loss or injury was not due to the fraud or negligence of its servants.[3] Where a railway company is sued for damages for "breaking a trunk," and for a detention of "goods checked," evidence is admissible of damage to any property properly included under the term baggage.[4] But in an action by an emigrant against a steamship company for lost baggage, the testimony of a custom-house inspector as to the value of the baggage which emigrants of the same class and nationality as plaintiff generally carried, is incompetent to show the probable value of plaintiff's baggage.[5] A lien exists in favor of a carrier on the baggage of its passengers not in their immediate use or actual possession.[6] But, although baggage has been delivered to it and checked, it has no right to retain custody thereof, if its owner, upon being required to pay an additional charge, declines to do so, and demands its return. And where, in such a case, the baggage was retained by the company, and was destroyed by fire, this was held a conversion, a recovery on which was not waived by the party having afterward accepted an order for the baggage from the president of the company.[7] The passenger going upon the same train with his baggage, is not essential to render the company liable for its safe transportation.[8] In Virginia, a statutory penalty is imposed upon railway carriers for failing to transport the baggage of their passengers.[9] But it is held that, since statutory penalties are not exclusive of damages at common law, unless expressly stated to be in lieu thereof,[10] a passenger may in that State recover the actual amount of

damages suffered by the failure of a railway company to transport his baggage.[11]

1 Meddleton v. Fowler, 1 Salk. 283; Wolf v. Summers, 2 Camp. 631; Upshare v. Aidee, 1 Comyn, 25.

2 Blumenthal v. Maine Central R. R. Co. (1888) 79 Me. 550; Pardee v. Drew, 25 Wend. 459; Hawkins v. Hoffman, 6 Hill, 586; 41 Am. Dec. 767; Powell v. Meyers, 26 Wend. 591; Walsh v. The H. M. Wright, 1 Newb. Adm. 494; Holdridge v. Utica etc. R. R. Co. 51 Barb. 191; Gore v. Norwich etc. R. R. Co. 2 Daly, 254; Camden etc. R. R. Co. v. Belknap, 21 Wend. 354; Blanchard v. Isaacs, 3 Barb. 388; Bomor v. Maxwell, 9 Humph. 630; 51 Am. Dec. 683; Orange County Bank v. Brown 9 Wend. 75; Prixotti v. McLaughlin, 1 Strob. 468; Woods v. Devin, 13 Ill. 747; 56 Am. Dec. 433; Williams v. Great Western R'y Co. 10 Ex. 15; Marshall v. York, N. & B. R'y Co. 11 Com. B. 655; Butcher v. London & S. W. R'y Co. 16 Com. B. 13; Richards v. London & S. C. R'y Co. 7 Com. B. 839; Midland R'y Co. v. Bromley, 17 Com. B. 372; COCKBURN, C. J., in Le Conteur v. London & S. W. R'y Co. 1 Law R. Q. B. 54, 59.

3 Garvey v. Camden etc. R. R. Co. 4 Abb. Pr. 171; Camden etc. R. R. Co. v. Baldauf, 16 Pa. St. 67; 55 Am. Dec. 481.

4 International & Great Northern R'y Co. v. Philips, 63 Texas, 590.

5 Carlson v. Oceanic Steam Navigation Co. (1888) 109 N. Y. 559, EARL, PECKHAM and GRAY, J. J., dissenting.

6 Roberts v. Koehler (1887), 30 Fed. Rep. 94

7 McCormick v. Pennsylva. ia Central R. R. Co. 99 N. Y. 65; 52 Am. Rep. 6.

8 Wilson v. Chesapeake etc. R. R. Co. 21 Gratt. 654.

9 Va. Code, ch. 61, § 17.

10 Va. Code, ch. 145, § 5.

11 Norfolk & W. R. R. Co. v. Irvine (1888), 84 Va. 553.

§ 898. Of the beginning of the carrier's liability for baggage.—The beginning of the carrier's liability for baggage is not limited to the moment at which it is checked. The passenger has a right to send his trunk to the station a reasonable time before the departure of his train, and the company's liability dates from its acceptance thereof at such reasonable time prior to its departure.[1] For example, if a trunk be accepted by the agent of the company at noon, the passenger intending to take the 3 P. M. train, the company is liable for its loss in the meanwhile.[2] And a carrier has been held liable for the loss of baggage, even though it was checked, in direct violation of its rules, before the purchase

of a ticket by the owner thereof, and even though at the time of its loss the ticket remained still unpurchased.[3]

1 Lake Shore & M. S. R'y Co. v. Foster, 104 Ind. 293; 54 Am. Rep. 319; Rogers v. Long Island R. R. Co. 56 N. Y. 620; Hickox v. Naugatuck R. R. Co. 31 Conn. 281; 83 Am. Dec. 143; Jordan v. Fall River R. R. Co. 5 Cush. 69; 51 Am. Dec. 44.

2 Rogers v. Long Island R. R. Co. 56 N. Y. 620.

3 Lake Shore & M. S. R'y Co. v. Foster, 104 Ind. 293; 54 Am. Rep. 319.

§ 899. **The word "baggage" defined and illustrated.**—Baggage has been defined to be "such things as a traveler usually carries with him for his personal convenience in the journey."[1] But from the nature of the case no definition of such a word can be constructed which will be applicable in every instance. Probably the best definition, or, rather, explanation, is the one given in an English case,[2] where it was said, "whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs,[3] either with reference to the immediate necessities [4] or the ultimate purpose of the journey,[5] must be considered as personal baggage. This would include not only all articles of apparel,[6] whether for use or ornament,[7] but also the gun-case or the fishing apparatus of the sportsman,[8] the easel of the artist on a sketching tour,[9] or the books of the student,[10] and other articles of an analogous character,[11] the use of which is personal to the traveler, and the takings of which have arisen from the fact of his journeying."[12]

1 Hawkins v. Hoffman, 6 Hill, 589; 41 Am. Dec. 767. For further definitions, see Story on Bailments, § 499, quoted, with approval, in Bowman v. Maxwell, 9 Humph. 624. See, also, *New York Central R. R. Co. v. Fraloff*, 100 U. S. 24; Hannibal R. R. Co. v. Swift, 12 Wall 272.

2 *Macrow v. Great Western R'y Co.* Law R. 6 Q. B. 622; S. C. 3 Alb. Law J. 476; S. C. 24 Am. Law T. 618, approved in Gleason v. Goodrich

Trans. Co. 32 Wis. 85, 98; 14 Am. Rep. 716. See Woods v. Devin, 17 Ill. 746; Chicago etc. R. R. Co. v. Collins, 56 Ill. 212.

3 *New York Central R. R. Co. v. Fraloff*, 100 U. S. 24, where a Russian countess recovered for the loss of a large quantity of lace; Herschon v. Hamburg-American Packet Co. 2 Jones & S. 521, where the bed taken by a steerage passenger for use on the journey was considered to be baggage; *Quimit v. Henshaw*, 35 Vt. 604, 84 Am. Dec. 646, where the feather-bed, bed-quilts, pillows, etc. of a *poor* man, accompanied by his family, were held to be necessary for his journey. So, in Parmelee v. Fischer, 22 Ill. 212, 74 Am. Dec. 138, two feather-beds, pillows, and coverlets, blankets, etc., an oil-cloth, table cover, German silver teapot, one set of dishes, and many other articles, were held to be personal baggage. So, also, bedding carried by a steerage passenger for use on the voyage: Hirschon v. American Packet Co. 2 Jones & S. (N. Y. Super. Ct.) 521. But whether bedding for his family, not for use on the journey, is baggage, is a question for the jury: *Quimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646.

4 The necessity and reasonableness of carrying the things as baggage, being in all cases a question for the jury: Merrill v Grinnell, 30 N. Y. 594; Johnson v. Stone, 11 Humph. (Tenn.) 419; Whitmore v. Steamer Caroline, 20 Mo. 513; Dibble v Brown, 12 Ga. 217; 56 Am Dec. 463; Shepherd v. Great Northern R'y Co. 8 Ex. 30; Brook v. Pickwick, 4 Bing. 218. And, in determining the necessity, the length of the journey is always to be considered: Parmelee v. Fischer, 22 Ill. 212; *New York Central R. R. Co.* v. *Fraloff*, 100 U. S. 24; Hannibal R. R. Co. v. Swift, 12 Wall. 262.

5 Toledo etc. R. R. Co. v. Hammond, 33 Ind. 379; 5 Am. Rep. 221; New Orleans etc. R R. Co. v. Moore, 40 Miss. 39. But a pair of handcuffs were held not to be baggage: Bonner v. Maxwell, 9 Humph. 629.

6 Duffey v. Thompson, 4 Smith E. D. 178; McCormick v. Hudson River R. R. Co. 4 Smith E. D. 181; Torpey v. Williams, 3 Daly, 162. Including not only clothing for the passenger himself, but also cloth for dresses for his wife and family, upon returning home: Dexter v. Syracuse etc. R. R. Co. 42 N. Y. 326; 1 Am. Rep. 527. And linen cut into shirt fronts: Duffy v. Thompson, 4 Smith E. D. 178. But not a dress for the passenger's landlady: Dexter v. Syracuse etc. R. R. Co. 42 N. Y. 326; 1 Am. Rep. 527. Nor m squerade costumes for use at a ball: Michigan etc. R. R. Co. v. Oehm, 56 Ill. 293. Nor a sacque and muff carried by a gentleman: Chicago etc. R. R. Co. v. Boyce, 73 Ill. 510; 24 Am. Rep. 268. Nor masonic regalia, nor engravings, nor valuable merchandise: Pardee v. Drew. 25 Wend. 459; Nevins v. Bay State etc. Co. 4 Bosw. 225.

7 Steers v. Liverpool etc. Co. 57 N. Y. 1; 15 Am. Rep. 453; McGill v. Rowland, 3 Barr, 451; Toledo etc. R. R. Co. v. Hammond, 33 Ind. 379; 5 Am. Rep. 221; Brooke v. Peckwick, 4 Bing. 218; Braty v. Grand Trunk R'y Co. 31 Up. Can. Q. B. 66. Either for the use of the passenger himself or of his immediate family: McCormick v Hudson River R. R. Co. 4 Smith E. D. 181; Smith v. Boston etc. R. R. Co. 44 N. H. 325; Mississippi etc. R. R. Co. v. Kennedy, 41 Miss. 671. This includes personal jewelry: Steers v. Liverpool etc. Co. 57 N. Y. 1; 15 Am. Rep. 453; Doyle v. Kyser, 6 Ind. 242; McCormick v. Hudson River R. R. Co. 4 Smith E. D. 181; Torpey v Williams, 3 Daly, 162. Such as two gold chains, two gold rings, a silver pencil-case: Braty v. Grand Trunk R'y Co. 32 Up. Can. Q. B. 66. A watch: McCormick v. Hudson River R. R. Co. 4 Smith E. D. 181; Doyle v. Kyser, 6 Ind. 242; American Contract Co. v. Cross, 8 Bush. 472; 8 Am. Rep. 471; Jones v. Voorhees, 10 Ohio, 145. *Contra*, Bomar v. Maxwell, 9 Humph. 621; and The Ionic, 5 Blatchf. 538. But not more than one watch: Mississippi Central R. R. Co. v. Kennedy, 41 Miss. 671. Nor a watch carried as a sample: Belfast etc. R'y Co. v. Keys, 9 H. L. Cas. 556. Nor jewelry intended for presents to the friends of the passenger: Dexter v. Syracuse etc. R R. Co. 42 N. Y. 326; 1 Am. Rep. 527; The Ionic, 5 Blatchf. 538; Nevins v. Bay State etc. Co. 4 Bosw. 225. Nor jewelry carried as merchandise or sam-

ples: Yznaga Del Valle v. The Richmond, 27 La. An. 90; Alling v. Boston etc. R. R. Co. 126 Mass. 121; 30 Am. Rep. 667; Michigan Central R. R. Co. v. Carrow, 73 Ill. 348; 24 Am. Rep. 248.

8 Hopkins v. Westcott, 6 Hill, 589; *Macrow v. Great Western R'y Co.* Law R. 6 Q. B. 612; S. C. 3 Asb. Law J. 4.6; Van Horn v. Kermit, 4 Smith E. D. 453. A rifle and revolver: Braty v. Grand Trunk R'y Co. 32 Up. Can. Q. B. 63. Even the gun of a harness-maker has been held to be baggage: Davis v. Cayuga etc. R. R. Co. 10 How. Pr. 330.

9 But see Mytton v. Midland R. R. Co. 4 Hurl. & N. 615.

10 Winter v. Pacific R. R. Co. 41 Mo. 503; Doyle v. Kiser, 6 Ind. 246; *Macrow v. Great Western R'y Co.* Law R. 6 Q. B. 612. Manuscript books: Hopkins v. Westcott, 6 Hill, 529.

11 Tools of one's trade may be carried as baggage: Kansas City, Ft. S. etc. R. R. Co. v. Morrison, 24 Kan. 572; 35 Am. Rep. 232; Porter v. Hildebrand. 14 Pa. St. 129. So, also, a pair of dueling pistols and a pocket pistol: Woods v. Devlin, 13 Ill. 746; 56 Am. Dec. 463; Chicago etc. R. R. Co. v. Collins, 53 Ill. 212; Davis v Michigan etc. R. R. Co. 23 Ill. 278; 74 Am. Dec. 151. And an opera glass: Toledo etc. R. R. Co. v. Hammond, 33 Ind. 379; 5 Am. Rep. 221. Likewise the instruments of an army surgeon traveling with troops: Hannibal R. R. Co. v. Swift, 12 Wall. (U. S.) 262. And dentist's tools: Brock v. Gale, 14 Fla. 523; 15 Am. Rep. 356.

12 *Macrow v. Great Western R'y Co.* Law R. 6 Q. B. 622. And this would seem to include articles purchased on the journey for the use of his family: Dexter v. Syracuse etc. R. R. Co. 34 N. Y. 326; and presents for a friend whom he is going to visit: Hudson v. Midland R'y Co. Law R. 4 Q. B. 366; The Ionic, 5 Blatchf. (U. S. Cir. Ct.) 538.

§ 900. The same subject, continued.—"On the other hand," continued Lord Cockburn, in the case quoted above,[1] "the term 'ordinary baggage' being thus confined to that which is personal to the passenger, and carried for his use or convenience, it follows that what is carried for the purpose of business,[2] such as merchandise, or the like;[3] or for larger or ulterior purposes,[4] such as articles of furniture, or household goods,[5] would not come within the description of ordinary baggage, unless accepted as such by the carrier."[6]

1 *Macrow v. Great Western R'y Co.* Law R. 6 Q. B. 622.

2 Alling v. Boston etc. R. R. Co. 126 Mass. 121; 30 Am. Rep. 667; Stimson v. Connecticut River R. R. Co. 98 Mass. 83; 93 Am. Dec. 140; Michigan Central R. R. Co. v. Carrow, 73 Ill. 348; 24 Am. Rep. 248.

3 The nature of which is not disclosed to the carrier: Michigan Central R. R. Co. v. Carrow, 73 Ill. 348; 24 Am. Rep. 248; Cahill v. London & N. W. R'y Co. 10 Com. B. N. S. 154, affirmed on appeal, 18 Com. B. N. S. 818; Belfast etc. R'y Co. v. Keys, 9 H. L. Cas. 556; Great Northern R'y Co. v. Shepherd, 8 Ex. 30; Mississippi Central R. R. Co. v. Kennedy, 41 Miss. 671; Cincinnati etc. R. R. Co. v. Marcus, 38 Ill. 219; Collins v. Boston R. R.

Co. 10 Cush. 606; The Ionic, 6 Blatchf. 538; Dibble v. Brown, 12 Ga. 83; 56 Am. Dec. 460; Bell v. Drew, 4 Smith E. D. 59; Stimson v. Connecticut etc. R. R. Co. 93 Mass. 83; 93 Am. Dec. 140; Hawkins v. Hoffman, 6 Hill, 586; 41 Am. Dec. 767; Doyle v. Kyser, 6 Ind. 242; Richards v. London & Brighton, etc. R'y Co. 7 Com. B. 839.

4 Thus, articles purchased for a stranger are not to be considered as baggage: The Ionic, 5 Blatchf. 538; Dexter v. Syracuse etc. R. R. Co. 42 N. Y. 326, 1 Am. Rep. 527; Nevin v. Bay State etc. Co. 4 Bosw. 225. Nor a client's title deeds, to be produced in a court whither an attorney is going: Phelps v. London & N. W. R'y Co. 16 Com. B. N. S. 321; 11 Jur. N. S. 852; 34 Law J. Com. P. 259; 13 Week. R. 782; 12 Law T. N. S. 496. Nor a drummer's samples: Stimson v. Connecticut River R. R. Co. 98 Mass. 83; 93 Am. Dec. 140. But see Hoeger v. Chicago M. etc. R'y Co. 63 Wis. 100; 53 Am. Rep. 271.

5 For example, bedding, intended not for use on the journey, but for the use of his family after being permanently settled: Phelps v. London & N. Western R'y Co. 19 Com. B. N. S. 321, per ERLE, C. J.; *Macrow v. Great Western R'y Co.* Law R. 6 Q. B. 612; Connolly v. Warren, 106 Mass. 146; 8 Am. Rep. 300.

6 *Macrow v. Great Western R'y Co.* Law R. 6 Q. B. 622; *Hoeger v. Chicago, M. etc. R'y Co.* 63 Wis. 100; 53 Am. Rep. 271. *Vide infra*, § 902.

§ 901. Of money as baggage.—A reasonable amount of money for necessary personal expenses during the journey may be taken by a passenger in his trunk, as baggage,[1] the reasonableness of the amount being measured by the object and length of the journey.[2] Thus, two hundred and eighty-five dollars has been held to be a reasonable amount to carry in one's trunk on a trip from Saratoga to New York City;[3] and in another case three hundred dollars was considered reasonable.[4] But money for the purchase of clothing at the passenger's destination,[5] or bank-notes packed in a portmanteau to defray the expenses of trial to which an attorney is going,[6] or even a small sum of money belonging to another person,[7] or money carried as a present[8] or for trade or business purposes, cannot be recovered for as baggage.[9] Neither can government bonds be considered baggage.[10]

1 Jordan v. Fall River R. R. Co. 5 Cush. 69; Davis v. Michigan etc. R. R. Co. 22 Ill. 278; Merrill v. Grinnell, 30 N. Y. 594; Whitmore v. Steamboat Carolina, 20 Mo. 513; Johnson v. Stone, 11 Humph. 631; Duffy v. Thompson, 4 Smith E. D. 178; Hellman v. Holliday, 1 Woolw. 65; Minter

v. Pacific R. R. Co. 41 Mo. 503; Dunlap v. International Steamboat Co. 98 Mass. 371.

2 Illinois Central R. R. Co. v. Copeland, 24 Ill. 332; 76 Am. Dec. 749; Jordan v. Fall River R. R. Co. 5 Cush. 69; 51 Am. Dec. 44; Fairfax v. New York Central R. R. Co. 73 N. Y. 167; 29 Am. Rep. 119.

3 Weed v. Saratoga etc. Co. 19 Wend. 534.

4 Illinois etc. R. R. Co. v. Copeland, 24 Ill. 332; 76 Am. Dec. 749

5 Hickox v. Naugatuck etc. R. R. Co. 31 Conn. 281; 83 Am. Dec. 143.

6 Philps v. London & N. W. R'y Co. 19 Com. B. N. S. 321.

7 Stewart v. International Steamboat Co. 98 Mass. 371.

8 The Ionic, 5 Blatchf. 538.

9 Jordan v. Fall River R. R. Co. 5 Cush. 69; Orange Co. Bank v. Brown, 9 Wend. 85; 24 Am. Dec. 129; Miles v. Cattle, 19 Con. Law Rep. 219; Chicago etc. R. R. Co. v. Thompson, 19 Ill. 578; Doyle v. Kiser, 6 Ind. 242; Dunlap v. International etc. Co. 98 Mass. 371; First National Bank v. Marietta etc. Co. 20 Ohio St. 259; 5 Am. Rep. 655; Weeks v. New York etc. R. R. Co. 72 N. Y. 50; Fairfax v. New York etc. R. R. Co. 73 N. Y. 167; 29 Am. Rep. 119; Hutchins v. Western etc. R. R. Co. 25 Ga. 61.

10 *Weeks v. New York etc. R. R. Co.* 9 Hun, 669.

§ 902. Knowledge of contents as affecting liability of carrier.—If the trunks, valises or other packages of a passenger contain articles of unusual value, it is his duty to inform the carrier of the fact,[1] and if he fail to do so he is guilty of such legal fraud as will absolve the carrier from liability for failure to transport them.[2] For by presenting them to the carrier in the ordinary way, to be checked, he represents by implication that they contain nothing but personal baggage.[3] In such a case the company cannot be held liable on the ground that baggage-masters at other stations on the same road had previously given checks for the same trunk or valise with a knowledge of the contents.[4] If, however, the carrier knew the nature of the contents, and received and checked them as baggage, it will be liable, although the articles were not such as are usually included in that term.[5] But to render the carrier liable it must have actual knowledge before accepting the package. It is not sufficient that the appearance was such as to put the com-

pany upon inquiry as to the contents. It is under no obligation to inquire.[6] Where, however, the packing is such that inquiry is needless, the nature of the contents being plainly visible, the company will be considered as having such knowledge thereof, as will render its acceptance without extra charge, equivalent to a waiver of its rights.[7]

1 Michigan etc. R. R. Co. v. Carrow, 73 Ill. 348; 24 Am. Rep. 248.

2 Blumenthal v. Maine Central R. R. Co. (1888), 79 Me. 550.

3 Blumenthal v. Maine Central R. R. Co. (1888), 79 Me. 550.

4 Blumenthal v. Maine Central R. R. Co. (1888), 79 Me. 550.

5 Chicago, R. I. etc. R. R. Co. v. Conklin, 32 Kan. 55; *Hoeger v. Chicago, M. etc. R'y Co.* 63 Wis. 100; 53 Am. Rep. 271, where the sample trunks of a drummer were so accepted; Jacobs v. Tutt (1888), 33 Fed. Rep. 412, where the trunk of a jewelry salesman was so received and the company held liable as for ordinary baggage; Hannibal etc. R. R. Co. v. Swift, 12 Wall. (U. S.) 262; Butler v. Hudson River R. R. Co. 3 Smith E. D. 571; Minter v. Pacific R. R. Co. 41 Md. 508; 97 Am. Dec. 288; Ross v. Missouri etc. R. R. Co. 4 Mo. App. 582; Waldron v. Chicago etc. R. R. Co. 1 Dakota, 351. *Contra*, Blumantle v. Fitchburg R. R. Co. 127 Mass. 322; 34 Am. Rep. 376.

6 Cahill v. London etc. R'y Co. 30 Law J. Com. P. 287; S. C. 31 Law J. Com. P. 271, where the package was marked "Glass."

7 Great Northern R'y Co. v. Shepherd, 8 Exch. 30; Waldron v. Chicago etc. R. R. Co. 1 Dakota, 351; Ross v. Missouri etc. R. R. Co. 4 Mo. App. 582.

§ 903. The limit of weight and value—Extra compensation.—A carrier may limit the amount and designate the nature of the things which it will accept as baggage.[1] It may require a statement of the value of the articles, and exact a premium for the greater risk incurred.[2] In a case decided not long since in Virginia, a rule that only baggage containing passengers' wearing apparel should be carried on passenger trains, was considered reasonable; and it was held that one who is in the habit of carrying his wares as baggage, and refuses to state that his trunk contains only wearing apparel, has no cause of action for damages for the company's refusal to carry it. In that

case, the plaintiff having been detected in violating the rule on previous occasions, filled his trunk with soiled wearing apparel, and brought it to be checked, for the purpose of having defendant refuse, unless he should sign an affidavit as to its contents, which he had determined not to do, and thus lay the foundation of an action for damages. But it was held that he could not question the reasonableness of the requirement as to signing the affidavit, and that he had no cause of action.[3] For the obligation to carry free of charge only extends to such things as passengers usually take with them as personal baggage,[4] and which are necessary for their use and comfort.[5] It may refuse to accept merchandise without compensation,[6] or unwieldy articles, such as hobby-horses, even though within the limit of weight.[7] Making an extra charge for accepting and carrying articles not classified as baggage will render the carrier liable for their loss through the fraud or negligence of its servants, in the absence of fraud on the part of the passenger.[8] And, on the other hand, a waiver of its right to demand extra compensation, is an assumption of liability as upon ordinary baggage of the usual amount.[9]

1 Mytton v. Midland R'y Co. 28 Law J. Ex. 335; Phe'ps v. London etc. R'y Co. 19 Com. B. (N. S.) 321; Rumsey v. North Eastern R'y Co. 14 Com. B. (N. S.) 641; Stewart v. London & N. Western R'y Co. 10 Jur. (N. S.) 805; Walsh v. The H. M. Wright, 1 Newberry (U. S.) 494.

2 The Bermuda, 23 Blatchf. C. C. 554; S. C. 27 Fed. Rep. 476; *Hollister v. Nowlen* (1833), 19 Wend. 234; S. C. Thompson on Carriers, 488.

3 Norfolk & W. R. R. Co. v. Irvine (1888), 84 Va. 553.

4 Hudson v. Midland R'y Co. Law R. 4 Q. B. 366.

5 Merrill v. Grinnell, 30 N. Y. 591; Stimson v. Connecticut River R. R. Co. 98 Mass. 83; 93 Am. Dec. 140; Smith v. Boston etc. R. R. Co. 44 N. H. 325.

6 Collins v. Boston etc. R. R. Co. 10 Cush. (Mass.) 603; The Ionic, 6 Blatchf. (U. S. Cir. Ct.) 538; Dibble v. Brown, 12 Ga. 83; 56 Am. Dec. 460;

Bell v. Drew, 4 Smith E. D. 59; Stimson v. Connecticut River R. R. Co. 93 Mass. 83; 93 Am. Dec. 140; Hawkins v Hoffman, 6 Hill, 586; Doyle v. Kyser, 6 Ind. 242.

7 Hudson v. Midland R'y Co. 10 Best & Smith, 504. *Cf.* Zunc v. South Eastern R'y Co. Law R. 4 Q. B. 539.

8 Camden etc. R. R. Co. v. Baldauf, 16 Pa. St. 67; 55 Am. Rep. 481 where the passenger's trunk contained specie. See, also, Hamburg-American Packet Co. v. Grattman (1889), 127 Ill. 598.

9 Glasco v. New York Central R. R. Co. 36 Barb. 557.

§ 904. Of baggage checks—Connecting carriers. The possession of a baggage check is *prima facie* evidence that the carrier received the passenger's baggage, and that it still retains it in custody.[1] Where a railroad company's trains, by an arrangement with a depot company, regularly enter and depart from the depot of the latter, which is intrusted with the business of handling and checking the baggage of passengers, furnishing its own checks therefor, such company must be deemed the agent of the railroad company in respect to such business.[2] And where the passenger delivers the check to the agent of a connecting railroad company, and receives its check in exchange, the presumption is, that the baggage is received in due course by the latter company, and it is responsible therefor.[3] But the presumption may be rebutted.[4]

1 Ahlbeck v. St. Paul, M. & M. R'y Co. (1883) 39 Minn. 424; Milnor v. New York etc. R. R. Co. 53 N. Y. 363; Davis v. Cayuga etc. R. R. Co. 10 How. Pr. 330; Chicago etc. R. R. Co. v. Clayton, 78 Ill. 616; Davis v. Michigan etc. R. R. Co. 22 Ill. 278; 74 Am. Dec. 151; Dill v. South Carolina R. R. Co. 7 Rich. (S. C.) 153; 62 Am. Dec. 407; Wilson v. Chesapeake etc. R. R. Co. 21 Gratt. (Va.) 654.

2 Ahlbeck v. St. Paul, M. & M. R'y Co. 39 Minn. 424.

3 Ahlbeck v. St. Paul, M. & M. R'y Co. 39 Minn. 424; Kansas Pacific R. R. Co. v. Moutelle, 10 Kan. 119. *Cf.* Davis v. Michigan etc. R. R. Co. 22 Ill. 278; 74 Am. Dec. 151; Hickox v. Naugatuck R. R. Co. 31 Conn. 281; 83 Am. Dec. 143.

4 Chicago etc. R. R. Co. v. Clayton, 78 Ill. 616.

§ 905. Liability of connecting carriers—The initial carrier.—The contract of carriage involves

not only the transportation of the passenger himself, but of his baggage also; so that a company contracting to transport a passenger to a point beyond its own line, through the agency of connecting carriers, assumes liability for the loss or injury of his baggage occurring on any part of the entire journey, even though it be through the fault of the connecting carrier.[1] And the same rules in regard to the termination of liability apply to the first carrier as in ordinary cases of transportation over a single line. It is liable as insurer, until the passenger has had a reasonable time to take his baggage away from the station at which his journey ends, and after the lapse of that time it remains liable as a warehouseman, for the negligence of the connecting carrier.[2] A through ticket, together with a through check, is evidence of the entirety of the contract, sufficient to prove the liability of the carrier issuing them;[3] unless, in selling the through ticket, it acted merely as the agent of the connecting carriers.[4] But a through check is not sufficient evidence to show the entirety of the contract, where no through ticket was issued.[5] If the first carrier received the baggage, it will not be relieved of liability by the second carrier having rechecked it.[6] Of course, where the first carrier did not check the baggage, the passenger taking it with him in the car and having it checked for the first time at the junction, he can look to the connecting carrier alone for damages.[7] So, where the first carrier checked the baggage with one of the checks of the connecting carrier, the latter alone is liable for an injury or loss occurring on its part of the journey.[8]

1 Le Sage v. Great Western R. R. Co. 1 Daly, 306; Hart v. Rensselaer R. R. Co. 8 N. Y. 37; 59 Am. Dec. 447; Weed v. Saratoga etc. R. R. Co. 19 Wend. 534; Torpey v. Williams, 3 Daly, 162; Burnell v. New York Central R. R. Co. 45 N. Y. 184; 6 Am. Rep. 61; Carey v. Cleveland etc. R. R. Co. 29 Barb. 35; McCormick v. Hudson River R. R. Co. 4 Smith E. D. 181; Quimley v. Vanderbilt, 17 N. Y. 306; 72 Am. Dec. 139; Kessler v. New York Central R. R. Co. 7 Lans. (N. Y.) 62; Central R. R. Co. v. Combs, 70 Ga. 533; 48 Am. Rep. 582; Wolff v. Central R. R. Co. 68 Ga. 653; 45 Am. Rep. 501; Hawley v. Scriven, 62 Ga. 342; 35 Am. Rep. 126; Wilson v. Chesapeake etc. R. R. Co. 21 Gratt. 654; 94 Am. Dec. 556; Candee v. Pennsylvania R. R. Co. 21 Wis. 582; Chicago etc. R. R. Co. v. Fahey, 52 Ill. 81; 4 Am. Rep. 587; Illinois Central R. R. Co. v. Copeland, 24 Ill. 332; 76 Am. Dec. 749; Check v. Little Miami R. R. Co. 2 Disn. (Ohio) 237; Chicago etc. R. R. Co. v. Clayton, 78 Ill. 616; Davis v. Michigan etc. R. R. Co. 22 Ill. 278; 74 Am. Dec. 151; Dill v. Railroad Co. 7 Rich. (S. C.) 158; 62 Am. Dec. 407. But see Isaacson v. New York Central etc. R. R. Co. 94 N. Y. 278; 46 Am. Rep. 142, where, although the first carrier was held liable it was for failure to deliver to the right connecting carrier, and not upon the entirety of the contract.

2 Burnell v. New York Central R. R. Co. 45 N. Y. 184; 6 Am. Rep. 61.

3 Wilson v. Chesapeake R. R. Co. 21 Gratt. 64; Chicago etc. R. R. Co. v. Fahey, 52 Ill. 81; 4 Am. Rep. 587; Illinois Central R. R. Co. v. Copeland, 24 Ill. 332; 76 Am. Dec. 749; Glasco v. New York Central R. R. Co. 36 Barb. 577; Check v. Little Miami R. R. Co. 2 Disn. (Ohio) 237; Kessler v. New York Central R. R. Co. 7 Lans. 62; Najac v. Boston etc. R. R. Co. 7 Allen (Mass.), 529; 83 Am. Dec. 686.

4 Central Trust Co. v. Wabash, St. L. & P. R'y Co (1887) 31 Fed. Rep. 247; Mauritz v. New York, L. E. etc. R. R. Co. (1886) 23 Fed. Rep. 765.

5 Green v. New York etc. R. R. Co. 12 Abb. Pr. (N. S.) 473.

6 Candee v. Pennsylvania R. R. Co. 21 Wis. 582. *Cf.* Mobile etc. R. R. Co. v. Hopkins, 41 Ala. 486; 94 Am. Dec. 607.

7 Straiton v. New York etc. R. R. Co. 2 Smith E. D. 134.

8 Wood's Railway Law, 1422, citing Milnor v. New York etc. R. R. Co. 53 N. Y. 363.

§ 906. **The same subject, continued—The intermediate and terminal carriers.**—The passenger may elect to sue either the first carrier or the connecting carrier on whose line his baggage was injured or lost; but in an action against the latter the burden is upon him to show fraud or negligence on the part of the defendant,[1] that the baggage was actually received by it from the first carrier,[2] and that there existed some traffic arrangement between the initial carrier and defendant whereby they stood in the relation of principal and agent, or of partners, or of joint contractors;[3]

while if he sue the first carrier, he need only show a contract of carriage for the whole journey.[4] Another disadvantage in suing the connecting carrier, is that it may avoid liability by showing that it delivered the baggage in the same condition that it received it from the first carrier.[5] For no partnership relation, either *inter sese* or as to third persons, is shown to exist between several railway companies by a sale of a through ticket and a delivery of a through check for baggage over their connecting lines, in the absence of any other evidence of their manner of conducting through business; and in such a case no liability will attach to the last carrier for the negligence of any of the prior carriers.[6] And when baggage, checked through by a railroad company over several connecting lines, arrives at its destination damaged, an intermediate road cannot be held to account for its good condition when transferred by it to the next road, unless such obligation is imposed by a special contract.[7]

1 Kessler v. New York Central R. R. Co. 61 N. Y. 538; S. C. 7 Lans. 62; Burnell v. New York Central R. R. Co. 45 N. Y. 184; 6 Am. Rep. 61; Burtis v. Buffalo etc. R. R. Co. 24 N. Y. 269; Root v. Great Western R. R. Co. 45 N. Y. 525; McCormick v. Hudson River R. R. Co. 4 Smith E. D. 181; Savannah etc. R'y Co. v. McIntosh, 73 Ga. 532; Barter v. Wheeler, 49 N. H. 9; 6 Am. Rep. 434; Illinois Central R. R Co. v. Frankenberg, 54 Ill. 88; 5 Am. Rep. 92; Coates v. United States Express Co. 45 Mo. 238; Toledo etc. R. R. Co. v. Merriam, 52 Ill. 123; 4 Am. Rep. 590; Cincinnati etc. R. R. Co. v. Pontius, 19 Ohio St. 221; 2 Am. Rep. 391; Check v. Little Miami R. R. Co. 2 Dis. (Ohio) 237.

2 Kessler v. New York Central etc. R. R. Co. 61 N. Y. 538.

3 Felder v. Columbia & G. R. R. Co. 21 S. C. 35; 53 Am. Rep. 656; Atchison, T. & S. F. R. R. Co. v. Roach, 35 Kan. 740.

4 *Vide* cases cited *supra*, note 1, § 905.

5 Lee Lin v. Terre Haute etc. R. R. Co. 10 Mo. App. 125, where, however, the defendant was unable to show that such was the fact; Myrick v. Michigan Central R. R. Co. 107 U. S. 102; Knight v. Portland R. R. Co. 56 Me. 234; 96 Am. Dec. 449; Gass v. New York P. & B. R. R. Co. 99 Mass. 220; 96 Am. Dec. 742; Burroughs v. Norwich etc. R. R. Co. 100 Mass. 26, 1 Am. Rep. 78.

6 Atchison, T. & S. F. R. R. Co. v. Roach, 35 Kan. 740; Felder v. Columbia & G. R. R. Co. 21 S. C. 35; 53 Am. Rep. 656.

7 Montgomery & Eufaula R'y Co. v. Culver, 75 Ala. 587; 51 Am. Rep. 483.

§ 907. Of the passenger's retention of custody. Ordinarily the carrier is not liable for baggage kept by a passenger under his own control,[1] except, of course, where its custody has been forced upon him by the carrier's improper refusal to take it in charge.[2] But the mere supervision of his baggage by the passenger, or his having access to the place where the carrier has placed it, does not relieve the latter of the liabilities attaching to the custody thereof, unless it can be shown that the passenger intended to retain exclusive control of his property.[3] And if the carrier moves baggage retained by the passenger, while he is absent from a sleeping-car, and, by reason of the change, a part of it is lost, it may be held liable therefor.[4] It would seem that in England, whether the baggage be delivered to a servant of the company or not, it is considered to be in the custody of the carrier. But English cases on this subject can be of but little value, as the system of checking baggage is there unknown.[5]

1 *Weeks v. New York, N. H. etc. R. R. Co.* 72 N. Y. 50, 28 Am. Rep. 104, reversing 9 Hun, 669; *Pullman Palace Car Co. v. Pollock* (1887), 69 Tex. 120; 5 Am. St. Rep. 3.; Power v. Utica etc. R. R. Co. 7 Hill, 47; Kinsley v. Lake Shore etc. R. R. Co. 125 Mass. 54; the E. R. Lee, 2 Abb. (U. S. Cir. and Dist. Ct.) 49, where the passenger left jewelry in his state-room, and the company was held not liable for its theft. So, in Cohen v. Frost, 2 Duer (N. Y. Super. Ct.) 335, where an emigrant on a vessel retained the custody of his trunk.

2 Munster v South Eastern R'y Co. 4 Com. B. N. S. 676. So, on the other hand, where the carrier refused to allow the passenger to retain the custody of his dog, his loss through the negligence of the baggage-master was imputed to the company: Couthing v. Hannibal etc. R. R. Co. 54 Mo. 385.

3 Mudgett v. Bay State Steamboat Co. 1 Daly, 151, where a steamboat company was held liable for baggage locked in a state-room; Gore v. Norwich etc. Transportation Co. 1 Daly, 254. *S. P.* Van Horne v. Kermit, 4 Smith E. D. 453; Crosby v. Boston etc. Steamboat Co. 43 How. Pr. 466; Duffy v. Thompson, 4 Smith E. D. 178.

4 Kinsley v. Lake Shore R. R. Co. 125 Mass. 54.

5 Le Conteur v. South Western R'y Co. Law R. 1 Q. B. 54; Great Northern R'y Co. v. Shepherd, 8 Exch. 30; Robinson v. Dunmore, 2 Bosw. & P. 416.

§ 908. Liability of sleeping-car companies for passengers' effects.—While ordinarily carriers by rail are not liable for baggage not committed to their custody,[1] the rule is different in regard to the liability of a sleeping-car company for the loss or injury of baggage which the passenger has retained in his own possession.[2] For, although a sleeping-car company is not liable as a common carrier nor as an innkeeper,[3] it is, nevertheless, a carrier for hire; and, by accepting compensation and inviting the weary public to enter and sleep, it does by implication undertake to keep a reasonable watch over its patrons' persons and property.[4] It cannot avoid this liability by posting notices disclaiming responsibility. It would be requisite to show that the passenger had knowledge of the notice.[5] "And if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor. Such a rule is required by public policy and by the true interest of both the passenger and the company; and the decided weight of authority supports it."[6] If, however, such reasonable watch be diligently kept, the company will not be liable for loss not occasioned by the fraud of its servants.[7]

1 *Vide supra*, § 907.

2 *Pullman Palace Car Co. v. Pollock* (1887), 69 Tex. 120; 5 Am. St. Rep. 31; *Pullman Palace Car Co. v. Gaylord*, 6 Ky. Law Rep'r, 279; S. C. 23 Am. Law Reg. N. S. 788. See cases cited *infra*, and the annotations to *Pullman Palace Car Co. v. Pollock*, 5 Am. St. Rep. 31, 34.

3 *Pullman Palace Car Co. v. Gaylord*, 6 Ky. Law Rep'r, 279; S. C. 23 Am. Law Reg. N. S. 788; Pullman Palace Car Co. v. Smith, 73 Ill. 360; 24 Am Rep. 258; Blum v. Pullman Palace Car Co. 1 Flip. 500; Welch v. Pullman Palace Car Co. 16 Abb. Pr. N. S. 352; Woodruff Sleeping etc. Co. v. Diehl,

84 Ind. 474; 43 Am. Rep. 102; Pullman Palace Car Co. v. Gardner (Supr. Ct. Pa.) 16 Am. & Eng. R. R. Cas. 324.

4 *Pullman Palace Car Co. v. Gaylord*, 6 Ky. Law Rep'r, 279; S. C. 23 Am. Law Reg. N. S. 788; Illinois Central R. R Co. v. Handy, 63 Miss. 609; 56 Am. Rep. 846; Woodruff Sleeping etc. Co. v. Diehl, 84 Ind. 474; 43 Am. Rep. 102; Lewis v. New York Sleeping Car Co. 143 Mass. 267; 56 Am. Rep. 852; Wood's Railway Law, 1447.

5 Lewis v. New York Sleeping Car Co. 143 Mass. 243; 56 Am. Rep. 852. See note to *Pullman Palace Car Co. v. Pollock*, 5 Am. St. Rep. 31, 34.

6 *Pullman Palace Car Co. v. Pollock* (1887), 69 Tex. 120; 5 Am. St. Rep. 31, quoting Lewis v. New York Sleeping Car Co. 143 Mass. 267; 56 Am. Rep. 852. *Acc.* Woodruff Sleeping etc. Co. v. Diehl, 84 Ind. 474; *Pullman Palace Car Co. v. Gaylord*, 6 Ky. Law Rep'r, 279; 23 Am. Law Reg. N. S. 788.

7 Illinois Central R. R. Co. v. Handy, 63 Miss. 609; 56 Am. Rep. 846; *Pullman Palace Car Co. v. Gaylord*, 6 Ky. Law Rep'r, 279; S. C. 23 Am. Law Reg. N. S. 788, citing Clark v. Burns, 118 Mass. 275; 19 Am. Rep. 456; Steamboat Crystal Palace v. Vanderpoel, 16 Mon. B. 302.

§ 909. The same subject, continued.—But the liability of sleeping-car companies for the effects of their passengers, is limited to articles of such reasonable nature and value as might be properly considered to be baggage in an action against a common carrier for the loss or injury of things committed to its custody.[1] The mere fact that property under the exclusive control of the passenger was lost in a sleeping-car, unaccompanied by any other proof, raises no presumption of negligence on the part of the company.[2] But where a sleeping-car company was sued for money stolen from the berth of a passenger while he was asleep, proof of another passenger having lost a sum of money in a similar manner at the same time was held evidence of a want of proper watchfulness on the part of the porter, and it appearing further that in the early morning the porter was found asleep, and that he was required to serve thirty hours continuously, including two nights, the question of the company's negligence was properly

submitted to a jury.[3] The passenger, however, may lose his right of action by contributory negligence.[4] Thus, in a Massachusetts case, a passenger who left the car for several minutes, and on returning found that her satchel had been stolen, was held to have been guilty of such contributory negligence as would bar her action for recovery.[5]

1 Pullman Palace Car Co. v Gardner (Pa.), 16 Am. & Eng. R. R. Cas. 324. As to what these articles are, *vide supra*, §§ 899 and 900.

2 Tracy v. Pullman Palace Car Co. 67 How. Pr. 151; Hilles v. Chicago etc. R. R. Co. 72 Iowa, 223; Pullman Palace Car Co. v. Smith, 73 Ill. 360; 24 Am. Rep. 258.

3 Lewis v. New York Central Sleeping-Car Co. 143 Mass. 267; 58 Am. Rep. 135.

4 Whitney v. Pullman Palace Car Co. 143 Mass. 243.

5 Whitney v. Pullman Palace Car Co. 143 Mass. 243.

§ 910. **The carrier's liability for delay in delivery of baggage—Measure of damages—Exemplary damages.**—The carrier is bound to deliver baggage within a reasonable time after its arrival,[1] and at a reasonably convenient place.[2] Where it appears in an action for the value of baggage stolen from a railroad, that the business of the station often required a delay of as much as two hours from the time of arrival until the delivery of baggage, and that the baggage in question was stolen during that time, the company is liable.[3] And a rule made by a railway company, to sell tickets and deliver baggage at only one of its five stations in a city, which is less convenient for such passengers as desire to transfer baggage to another road, and to carry all baggage on to the main station, though the trains regularly stop at the other stations to allow passengers to alight from or get on them, is, as a matter of law, unreasonable and void. Accordingly, in an action for damages by a passenger whose

baggage was under such a rule wrongfully carried beyond the station at which he desired it delivered to him, exemplary damages may be given, if the jury believe the act to be committed willfully, or with such negligence as indicates a wanton disregard of the rights of others.[4] But in an action brought against a railway company by a passenger, to recover damages for a delay in his journey, occasioned by a detention of his baggage, it was held that his damages could not be reckoned as the difference in value of the goods at the time of their arrival, and what it would have been if they had arrived on time.[5]

1 Jacobs v. Tutt (1888), 33 Fed. Rep. 412; International & G. N. R'y Co v. Philips, 63 Tex. 590; Cary v. Cleveland etc. R. R. Co. 29 Barb. 35.

2 Pittsburgh, C. & St. L. R'y Co. v. Lyon (Pa. 1888), 37 Am. & Eng. R. R. Cas. 231.

3 Jacobs v. Tutt (1888), 33 Fed. Rep. 412.

4 Pittsburgh, C. & St. L. R'y Co. v. Lyon (Pa. 1888), 37 Am. & Eng. R. R. Cas. 231.

5 International & Great Northern R'y Co. v. Philips, 63 Tex. 590.

§ 911. Of notices and stipulations as affecting liability for baggage.—As a general rule a common carrier cannot, by mere declarations, stipulations or notices, upon a ticket or check, or otherwise by a mere general notice, limit his liability.[1] Accordingly, a mere notice on a check or ticket that all baggage is carried at the owner's risk does not affect the liability of the carrier for its loss or injury;[2] certainly, not where it is printed in type smaller than that in which the general purport of the ticket is stated.[3] There is no presumption that the passenger read the notice.[4] It must be shown that it was actually brought to his knowledge while he yet had an opportunity to recede from his posi-

tion as a passenger;[5] and that he consented to the limitation therein imposed.[6]

1 Georgia R. R. Co. v. Gunn, 68 Ga. 350; Wilson v. Chesapeake etc. R. R. Co. 21 Gratt. 654, 672; Story on Contracts, § 761; Bank of Kentucky v. Adams Express Co. 93 U. S. 174; Evansville etc. R. R. Co. v. Young, 28 Ind. 516; *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455, note 458; Logan v. Pontchartrain R. R. Co. 11 Rob. 24; 43 Am. Dec. 199; Southern Express Co. v. Purcell, 37 Ga. 103; 92 Am. Dec. 53, and note; Southern Express Co. v. Newby, 36 Ga. 635; 91 Am. Dec. 783. *Contra*, in Pennsylvania: Powell v. Pennsylvania R. R. Co. 32 Pa. St. 414; 75 Am. Dec. 554; American Exp. Co. v. Lands, 55 Pa. St. 140; Pennsylvania R. R. Co. v. Miller, 87 Pa. St. 395; Adams Exp. Co. v. Sharpless, 77 Pa. St. 517; Clyde v. Hubbard, 88 Pa. St. 353; Lanig v. Colder, 8 Pa. St. 479; 49 Am. Dec. 533; Bingham v. Rogers, 6 Watts & S. 495; 40 Am. Dec. 581.

2 Mauritz v. New York, L. E. etc. R. R. Co. 23 Fed. Rep. 765; Camden etc. R. R. Co. v. Burke, 13 Wend. 611; Rawson v. Pennsylvania R. R. Co. 48 N. Y. 212; 8 Am. Rep. 543. See *Hollister v. Nowlen*, 19 Wend. 234; S. C. Thompson on Carriers, 483.

3 Verner v. Sweitzer, 32 Pa. St. 208.

4 Malone v. Boston etc. R. R. Co. 12 Gray (Mass.), 388; 74 Am. Dec. 598; Brown v. Eastern R. R. Co. 11 Cush. (Mass.) 97. See Mauritz v. New York, L. E. etc. R. R. Co. 23 Fed. Rep. 765.

5 Logan v. Pontchartrain R. R. Co. 11 Rob. (La.) 24; 43 Am. Dec. 199.

6 Kansas City, St. J. & C. B. R. R. Co. v. Rudebaugh (1888), 38 Kan. 45; and cases cited *supra*.

§ 912. Of the termination of the carrier's liability for baggage.—The carrier's liability for baggage terminates only when the passenger has had a reasonable time wherein to remove it, after the company was ready to deliver it[1] at the station to which it was destined. When the delay arises through the mistake of the railway, it will, of course, continue liable.[2] It is the duty of the baggage-master to remain at the station for a reasonable time after the arrival of trains, for the purpose of delivering baggage to passengers, or their servants; and loss occurring through his leaving the depot, immediately, will fall upon the company.[3] Where a railroad company delivers all of its baggage to a union depot company, to be cared for and delivered to passengers on presentation of checks, it makes the depot company its agent for that purpose, and it is liable

as a common carrier for loss of any baggage, while in the depot company's custody, occurring before a reasonable time for delivery has elapsed.[4] After the lapse of a reasonable time, the company's liability is changed from that of a carrier to the liability of an ordinary bailee for hire; from the liability of an insurer to that f a warehouseman. And the passenger who has failed to remove his baggage, must show that its loss or injury was the result of the company's negligence.[5] The reasonableness of the passenger's delay in taking his baggage away, depends upon the facilities to be had for removing it, and the custom of the place.[6] Ordinarily, he incurs a risk by leaving it overnight.[7] But it may be shown that the depot was at a distance from the village, and no conveyance could be hired to transport it; that the passenger was sick and lame, and that the company agreed to let it remain; in which case it continues liable as a carrier.[8]

1 Louisville etc. R. R. Co. v. Mahan, 8 Bush, 135; Torpey v. Williams, 3 Daly, 162; Klein v. Hamburg etc. Packet Co. 3 Daly, 390.

2 Toledo etc. R. R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221, where the baggage was taken to the wrong station and there stored.

3 Dinnig v. New York etc. R. R. Co. 49 N. Y. 546.

4 Jacobs v. Tutt (1833), 33 Fed. Rep. 412.

5 Roth v. Buffalo etc. R. R. Co. 34 N. Y. 548; 90 Am. Dec. 734; St Louis etc. R. R. Co. v. Hardway, 17 Ill. App. 331; Chicago & A. R. R. Co. v. Addizoat, 17 Ill. App. 632; Minor v. Chicago etc. R. R. Co. 19 Wis. 40; 88 Am. Dec. 670; *Hoeger v. Chicago, M. etc. R'y Co.* 63 Wis. 100; 53 Am. Rep. 271.

6 Mote v. Chicago etc. R. R. Co. 27 Iowa, 22; 1 Am. Rep. 212.

7 Jacobs v. Tutt (1833), 33 Fed. Rep. 412, where the baggage arrived on the afternoon of one day, but was not called for until 9 or 10 A. M. of the next day, and the company was held free from liability for its being stolen, no negligence on its part being shown; Morris v. Third Avenue R. R. Co. 1 Daly, 232; Jones v. Norwich etc. Transportation Co. 50 Barb. 493; Louisville etc. R. R. Co. v. Mahan, 8 Bush, 184.

8 Curtis v. Avon etc. R. R. Co. 49 Barb. 148.

CHAPTER XXXVI.

CARRIERS OF GOODS.

§ 913. Railway and transportation companies as common carriers—Exceptions to the rule.
§ 914. Beginning of the carrier's liability.
§ 915. Termination of the carrier's liability.
§ 916. Constructive delivery—Notification of arrival.
§ 917. Whether delivery to connecting carrier terminates liability of initial carrier.
§ 918. Selection of connecting carrier.
§ 919. Liability of connecting carrier.
§ 920. Through shipment—Traffic associations.
§ 921. The carrier's liability as insurer.
§ 922. Exceptions to the carrier's liability as insurer.
§ 923. The same subject, continued.
§ 924. The carrier's liability as warehouseman.
§ 925. Of the carrier's obligations—(*a*). To receive and carry.
§ 926. "Strikes," as affecting the obligation to receive and carry.
§ 927. (*b*). To supply safe and suitable cars.
§ 928. The same subject, continued.
§ 929. (*c*). To separate goods injurious to each other.
§ 930. (*d*). To deliver to the right person at the designated place.
§ 931. The same subject, continued.
§ 932. (*e*). To deliver within a reasonable time.
§ 933. The same subject, continued—Presumption as to the reasonableness of time.
§ 934. (*f*). In respect of "leaks and outs."
§ 935. (*g*). In respect of live-stock shipments—Duty to supply safe and suitable cars.
§ 936. Additional duties of carriers of live-stock—Special agreements.
§ 937. (*h*). In respect of stoppage *in transitu*.
§ 938. The same subject, continued.
§ 939. The carrier's right to compensation, and its lien to secure payment.
§ 940. Payment of charges in advance—Waiver.
§ 941. Excessive charges.
§ 942. State regulation of rates—Railway commission.

§ 943. Unjust discrimination
§ 944. Pleading, evidence, etc.
§ 945. Who may recover.
§ 946. Measure of damages for refusal to carry.
§ 947. Measure of damages for delay.
§ 948. Special damages for loss resulting from delay.
§ 949. Measure of damages for loss or destruction of goods.
§ 950. Measure of damages for injury to goods.

§ 913. Railway and transportation companies as common carriers—Exceptions to the rule.—A common carrier is defined by Mr. Wood,[1] as one who plies between certain *termini*, and openly professes to carry goods for hire for all such persons as may choose to employ him.[2] While carriers by rail, whether transportation companies[3] or companies owning and operating railways, are within this definition, and, as a general rule, are subject to all the liabilities imposed both by the common and statutory law upon persons exercising a like public function,[4] there are, nevertheless, circumstances under which they act merely as private carriers, and are to be held liable only as such. For a common carrier, by the representations which it has made to the public, and the usages of the business, may profess to carry only certain kinds of goods.[5] And if by special contract in exceptional instances, it undertakes to carry things of a different kind, contrary to its general usage, its liabilities are to be measured in each case by the contract of carriage, and not by those obligations which the law imposes upon it as a common carrier. Thus, a railway company will not be held liable as a common carrier under a contract to transport a menagerie in cars,

ned and controlled by the proprietor thereof,

run by employees of the company, upon a time

schedule arranged for the convenience of the proprietor of the menagerie. And it may, accordingly, lawfully stipulate against liability for injuries to the menagerie through want of care.[6]

1 Wood's Railway Law, 1571.

2 Russell v. Livingstone, 19 Barb. 344; Verner v Sweitzer, 32 Pa. St. 208; Mershon v. Hohensack, 22 N. J. 372; Fuller v. Bradley, 25 Pa. St. 120; Samms v. Stewart, 20 Ohio, 69.

3 *Merchants' Dispatch Transp. Co. v. Block Bros.* (1887), 86 Tenn. 392; 6 Am. St. Rep. 847.

4 *Falvey v. Georgia R. R. Co.* 76 Ga. 597; 2 Am. St. Rep. 58; Mobile etc. R. R. Co. v Weiner, 49 Miss. 725; Mobile etc. R. R. Co. v. Williams, 54 Ala. 168; Armentrout v. St. Louis etc. R. R. Co. 1 Mo. App. 153; Houston etc. R. R. Co. v. Ham, 44 Tex. 628; Hubbard v. Harnden Express Co. 10 R. I. 244; Nashville etc. R. R. Co. v. David, 6 Heisk. (Tenn.) 261; Finn v. Western R. R. Co. 112 Mass. 524; Ohio etc. R. R. Co. v Yohe, 51 Ind. 181; Palmer v. Grand Junction R'y Co. 4 Mees. & W. 749; Richards v. London etc. R'y Co. 7 Com. B. 839; Cranch v. London etc. R'y Co. 14 Com. B. 255.

5 Wood's Railway Law, 1572; Tunnell v. Pettijohn, 2 Har. (Del.), 48; Powell v. Mills, 30 Miss. 231; De Mott v. Larraway, 14 Wend. 225; Crosby v. Fitch, 12 Conn, 410; Williams v. Grant, 1 Conn. 487; Richards v. Gilbert. 5 Day (Conn.), 415; Bell v. Reed, 4 Binn. Pa. 127; Moriarty v. Harnden's Express, 1 Daly, 227; Michigan etc. R. R. Co. v. McDonough, 21 Mich. 162; Bennett v. Peninsular etc. S. B. Co. 6 Com. B. 775; Johnson v. Midland R'y Co. 4 Ex. 367.

6 *Coup v. Wabash etc. R'y Co.* 56 Mich. 111; 56 Am. Rep. 374.

§ 914. Beginning of the carrier's liability.— The liability of a railway carrier begins when the goods are delivered at the usual place for receiving freight,[1] with the knowledge and acquiescence of an authorized agent of the company.[2] But merely leaving the goods at the usual place,[3] or loading them upon the company's cars, does not render the company liable for them, unless one of its authorized agents accepts or acquiesces in the delivery.[4] Where certain goods, which a railway company was accustomed to keep stored in and ship from its warehouse under a contract with the shipper, were marked as of a higher grade and specified as such in the bill of lading, it was held in an action on the bill that the only issue was as to the com-

pany's liability upon the bill of lading as a common carrier, and that it was erroneous to instruct the jury upon any theory of liability as warehouseman, by reason of the connection of the company with the goods while in the warehouse, and prior to delivery for shipment.[5]

1 Bergheim v. Great Eastern R'y Co. 3 Com. P. Div. 22; Evershed v. London etc. R'y Co. 3 Q. B. Div. 134. *Cf.* Mobile etc. R. R. Co. v. Weiner, 49 Miss. 725; Knight v. Providence etc. R. R. Co. 13 R. I. 572. The fact that the carriage of freight by a railway company is by a statutory provision regarded as begun upon the signing of the bill of lading, does not relieve the company of its liability therefor from the time the goods were delivered: East Line etc. R'y Co. v. Hall, 64 Tex. 615.

2 Rogers v. Long Island R. R. Co. 2 Lans. (N. Y.), 269; Winkfield v. Packington, 2 Craig & P. 599; Long v. Horne, 1 Craig & P. 610; Taff Vale R'y Co v. Giles, 2 El. & B. 823. A railway company is bound by a contract for the transportation of goods entered into by a station agent, in whom authority so to contract is apparently vested, unless notice of limitations on his power is shown on the part of the shipper: Gelvin v. Kansas City etc. R. R. Co. 21 Mo. App. 273.

3 Selway v. Holloway, 1 Ld. Raym. 46.

4 Lovett v. Hobbs, 2 Shaw, 127; Leigh v. Smith, 1 Craig & P. 640.

5 St. Louis, I. M. & S. R'y Co. v. Knight, 122 U. S. 79.

§ 915. Termination of the carrier's liability.— The common carrier's liability terminates only upon the actual or constructive delivery of the goods to the consignee, or his agent, at the place to which they were consigned; for it is its duty to deliver as well as to carry.[1] This duty arises from its warranty as insurer, independently of any negligence on its part.[2] A railway carrier's liability, as a common carrier, for property commonly and most conveniently removed directly from the cars instead of through a warehouse, ceases only upon the cars being placed in a location safe and convenient for unloading; and a verdict subjecting the company to liability as a common carrier will be held justified by the finding of a jury that a car was placed so that it could be unloaded only with difficulty.[3]

Thus the liability of a carrier of wheat does not cease until the car has been placed at its destination in a place where it can be easily unloaded.[4] The constitution of Illinois requires railways to deliver grain at any elevator or warehouse that can be reached by their tracks, and renders it obligatory upon them to allow warehouses and coal-bunks to make connection with their tracks.[5] Goods will be considered as delivered to the consignee thereof, if delivered to his authorized agent at the point of destination.[6] But there is no authority vested in the broker of a shipper to order the delivery of freight shipped subject to the shipper's order.[7] A common carrier is not relieved of its duty to deliver a package, which it has received for that purpose, by the mere fact of the package being addressed to itself or its agent, in the absence of an agreement that it is to retain the same for the convenience of the owner.[8] It is sufficient evidence of non-delivery to show that the goods never reached the consignee.[9]

1 The Mary Washington, 1 Abb. U. S. 1; Lamb v. Camden etc. R. R. Co. 2 Daly, 454; Parker v. Flagg, 26 Me. 181; Schenck v. Philadelphia Steam Propeller Co. 69 Pa. St. 109; Eagle v. White, 6 Wheat. (Pa.) 505; Erskine v. Thames, 6 Miss. 371; Harris v. Rand, 4 N. H. 259; Ludwig v. Meyre, 5 Watts & S. 434; Moffat v. Great Western R'y Co. 15 Law T. N. S. 630; Fowles v. Great Western R'y Co. 7 Ex. 699. *Cf.* Kansas City Transfer Co. v. Neiswanger, 18 Mo. App. 103.

2 Richards v. London etc. R'y Co. 7 Com. B. 839, and cases cited *supra*.

3 *Independence Mills Co. v. Burlington C. R. & N. R. R. Co.* and *Minneapolis & St. L. R'y Co.* 72 Iowa, 535; 2 Am. St. Rep. 258.

4 *Independence Mills Co. v. Burlington C. R. & N. R. R. Co.* and *Minneapolis & St. L. R'y Co.* 72 Iowa, 535; 2 Am. St. Rep. 258.

5 Ill. Const. (1870) Art. XIII, § 5.

6 Illinois Central R. R. Co. v. Simpson, 17 Ill. App. 325

7 Watson v. Hoosac Tunnel Line Co. 13 Mo. App. 263.

8 Bennett v. Northern Pacific Express Co. 12 Or. 49.

9 Griffith v. Lee, 1 Craig & P. 110; Gilbart v. Dale, 5 Ad. & E. 547; Evans v. Bristol etc. R'y Co. 10 Week R. 359.

§ 916. **Constructive delivery—Notification of arrival.**—The carrier's liability may be terminated by a constructive delivery as well as by a delivery in fact.[1] Thus, if the consignee take possession of freight while in process of unloading, it will be held to constitute a delivery, even though there be no removal from the carrier's premises.[2] But the mere fact that the consignee or his servants were present, and looked on while the carrier was unloading, does not make the unloading a delivery, nor relieve the carrier of its obligation to deliver safely.[3] Constructive delivery may also consist in notifying the consignee of the arrival, and putting the goods in the usual place for unloading.[4] And the carrier remains liable as carrier until such notification has been given,[5] unless notice be waived in the bill of lading,[6] or unless the consignee actually knows of their arrival;[7] and after he has been notified, or has learned of their arrival, the company remains liable until he has had a reasonable time to remove them.[8] But when the company has made reasonable efforts to notify the consignee, and has been unable to find him, it is absolved from further liability as a common carrier.[9] Whether due inquiry has been made, is for the jury to determine; and evidence as to whether the consignee was well known at the place of destination is admissible upon that issue.[10] So, also, in general, it is for the jury to determine what facts are sufficient to constitute a delivery.[11] Even after constructive delivery, a carrier is liable for goods taken out of his possession, by one taking without intent to steal, although the bill of lading exempts from loss by theft.[12]

1 *Turbell v. Royal Exchange Shipping Co.* (1888) 110 N. Y. 170; 6 Am St. Rep. 350.

2 Shepherd v. Bristol etc. R'y Co. Law R. 3 Ex. 189.

3 Rooth v. Northeastern R'y Co. Law R. 2 Ex. 173.

4 *Turbell v. Royal Exchange Shipping Co.* (1888) 110 N. Y. 170; 6 Am. St. Rep. 350.

5 McAndrews v. Whellock, 53 N. Y. 40; Zinn v. New Jersey Steamboat Co. 49 N. Y. 442: Solomon v. Philadelphia etc. Steamboat Co. 2 Daly, 104. *Contra*, Stone v. New York etc. R. R. Co. 113 Mass. 521; Barron v. Eldredge, 100 Mass. 455; Thomas v. Boston etc. R. R. Co. 10 Met. 472; Norway Plains Co. v. Boston etc. R. R. Co. 1 Gray, 263.

6 Gashweiller v. Wabash etc. R'y Co. 83 Mo. 112, 53 Am. Rep. 558; where, under a provision in the bill of lading that, unless the goods were removed on the day of arrival, they should be stored at owner's risk, it was held, that no notice was requisite.

7 Pelton v. Rensselaer etc. R. R. Co. 54 N. Y. 214; Fenner v. Buffalo etc. R. R. Co. 44 N. Y. 505.

8 Sprague v. New York Central R. R. Co. 52 N. Y. 637; Pinney v. First Division St. Paul etc. R. R. Co. 19 Minn. 251; Buckley v. Great Western R. R. Co. 13 Mich. 121; Culbreath v. Philadelphia etc. R. R. Co. 3 Houst. 392; Shenk v. Philadelphia Steam Propeller Co. 60 Pa. St. 109; The Mary Washington, 1 Abb. U. S. 1; Lamb v. Camden etc. R. R. Co. 2 Daly, 454; Solomon v. Philadelphia Steamboat etc. Co. 2 Daly, 104; Graves v. Hartford etc. Steamboat Co. 33 Conn. 143; Gatliffe v. Bourne, 4 Bing. 333, cited in Wood's Railway Law, 1532.

9 Pelton v. Rensselaer etc. R. R. Co. 54 N. Y. 214.

10 Witbeck v. Holland, 45 N. Y. 13.

11 Hedges v. Hudson River R. R. Co. 6 Rob. (N. Y.) 119; Quiggin v. Dunn, 1 Mees. & W. 174.

12 *Turbell v. Royal Exchange Shipping Co.* (1888) 110 N. Y. 170; 6 Am. St. Rep. 350.

§ 917. Whether delivery to connecting carrier terminates liability of initial carrier.—In England the liability of a common carrier continues until delivery of the goods at their place of destination, even where it is beyond the carrier's own line, unless a contrary agreement has been made by special contract.[1] In the American States, however, it is generally held that in the case of shipments to parts beyond the carrier's own route, its liability terminates upon delivery of the goods to the connecting carrier; unless it has contracted to deliver them at their destination;[2] or unless there were some traffic agreement between the

initial and connecting carriers, amounting to a partnership.[3] Thus, where it was stipulated in a shipping contract, for goods to be carried beyond the line of the contracting company, that the property should be delivered only upon presentment of a bill of lading, the initial carrier, by delivering the property to a connecting line to be forwarded, accompanied by the necessary information with regard to delivery, was held to be relieved of any liability for its delivery without the presentation of the bill of lading.[4]

1 Fowles v. Great Western R'y Co. 7 Ex. 699; Moffatt v. Great Western R'y Co. 15 Law T. N. S. 63; Muschamp v. Lancaster etc. R'y Co. 8 Mees & W. 421; Mytton v. Midland R'y Co. 4 Hurl. & N. 615; Bristol etc. R'y Co. v. Collins, 7 H. L. Cas. 194; Wood's Railway Law, 1572.

2 Sumner v. Walker, 30 Fed. Rep. 261; Ortt v. Minneapolis & St. L. R'y Co. 36 Minn. 396; *Knott v. Raleigh etc. R. R. Co.* (1887) 98 N. C. 73; 2 Am. St. Rep. 321; Ramsom v. Helland, 50 N. Y. 611; Root v. Great Western R. R. Co. 45 N. Y. 524; McDonald v. Western R. R. Co. 34 N. Y. 497; Grindell v. Eastern Express Co. 67 Me. 317; Darling v. Boston etc. R. R. Co. 11 Allen (Mass.) 295; Dillon v. New York Central R. R. Co. 1 Hilt. 231; Hunt v. New York Central R. R. Co. 1 Hilt. 228; Crawford v. Southern R. R. Assoc. 51 Miss. 222; Union etc. R. R. Co. v. Hart, 30 Ga. 793; *Hadd v. United States and Canada Express Co.* 52 Vt. 352; 36 Am. Rep. 757; Milan v. Michigan Southern R. R. Co. 16 Mich. 201; Lowell v. Wire Fence Co. 8 Allen, 189; Baltimore etc. R. R. Co. v. Schumaker, 29 Md. 176; Jacobs v. Hooker, 1 Edm. Sel. Cas. (N. Y.) 472; Britnall v. Saratoga etc. R. R. Co. 32 Vt. 665; Judson v. Western R. R. Co. 4 Allen (Mass.) 520; Mullarky v. Baltimore etc. R. R. Co. 9 Phila. (Pa.) 514.

3 *Knott v. Raleigh etc. R. R. Co.* (1887), 98 N. C. 73; 2 Am. St. Rep. 321.

4 Rickerson Roller-mill Co. v. Grand Rapids & I. R. R. Co. (1887) — Mich. —

§ 918. Selection of connecting carrier.—Where a shipper accepts, before shipment, a bill of lading for the transportation of goods to a point beyond the *terminus* of the line of the initial carrier, the law imports into the contract, where it is silent, the provision allowing the carrier to select any stomary and reasonably safe and direct route by ich to forward the goods from the *terminus* of line, and this cannot be contradicted by parol

evidence of a prior verbal agreement designating a particular route.[1] A delivery to a railway company, of property consigned to a point beyond its line, carries with it the apparent authority of forwarding the same to its destination by any of the ordinary routes thereto; and a connecting company, upon receiving the goods in the usual course of business, without notice of any special instructions to the first company, and transmitting them to the place of their consignment, is entitled to demand the ordinary and usual freight therefor; and it is not an implied notice to the second company, of the instructions given to the first, that when it receives the goods they are loaded in an appropriately marked car of the particular line over which the shipper ordered them to be forwarded.[2] But if the contract of shipment was to forward by a designated road, and the first carrier selects a different route, it is liable for loss or injury occurring while the goods were in the custody of the carrier selected by it.[3] The owner may make both carriers defendants to his suit for recovery, and the connecting carrier does not avoid liability for losses occurring on its line by showing that the contract which the shipper made with the initial carrier was for transportation over the route of a different connecting line.[4]

1 Snow v. Indiana, B. & W. R'y Co. 109 Ind. 422.

2 Patten v Union Pacific R'y Co. 29 Fed. Rep. 590.

3 *Independence Mills Co. v. Burlington etc. R. R. Co.* 72 Iowa, 535; 2 Am. St. Rep. 258.

4 *Independence Mills Co.* v. *Burlington etc. R. R. Co.* 72 Iowa, 535; 2 Am. St. Rep. 258.

§ 919. Liability of connecting carrier.—A connecting carrier is liable only as a forwarding agent,

and is not responsible for the loss of goods beyond its line, in the absence of a contract to that effect;[1] nor, on the other hand, can it claim the benefit of a contract between the shipper and the initial carrier, limiting the liability of the latter and relieving it of all responsibility upon delivery to the connecting carrier.[2] But the sub-carrier of a transportation company is its agent, not its consignor or consignee.[3] Under a shipping contract, made between a railway company for itself, the warehouseman, who is to receive the goods and deliver them to the connecting carrier, and the connecting carrier on the one part, and the shipper, who is ignorant of the tripartite agreement, on the other, the railway company was held not to be the agent of the shipper, and to have no power to bind him by any contributory negligence of which it might be guilty in delivering the property in an unsafe condition in the yard of the warehouseman.[4]

1 *Knott v. Raleigh & Gaston R. R. Co.* (1887) 98 N. C. 73; 2 Am. St. Rep. 321.

2 Burrows v. Grand Trunk R'y Co. (1887) — Mich. —

3 *Merchants' Dispatch Transportation Co. v. Bloch Bros.* 86 Tenn. 392; 6 Am. St. Rep. 847.

4 Merchants' Wharf-boat Association v. Wood, 64 Miss. 661.

§ 920. Through shipment—Traffic associations. While a carrier is not ordinarily liable for loss, injury, or delay occurring after it has delivered goods to a connecting carrier, yet, where it has entered into a contract of through shipment to a point beyond its own *terminus*, it remains responsible for the goods until their delivery at the place of destination.[1] And a stipulation by a carrier contracting to carry over its own and connecting lines, that any loss should fall upon that line only upon which

the loss happens, is void, because it is an attempted limitation of the carrier's liability for its own negligence.[2] The evidence, however, showing liability for carriage over a connecting line, must be plain and convincing, and cannot be deduced by mere inference.[3] Thus, a mere receipt for goods marked for a place beyond its own *terminus*, will not be held to import an agreement to carry to the place of consignment.[4] So, a contract for the transportation of live-stock, made by using a printed blank, which, after acknowledging the receipt of the stock, set forth, in printing, "To be delivered at ——," and then, in writing, "Consigned to F. B. & Co., Chicago, Ill.," and further declaring that, where the stock should pass over more than one road to reach its destination, the company upon whose road any damage should be sustained should alone be liable therefor, was held not to be a contract on the part of the carrier to transmit the stock to Chicago, if its line did not, in fact, extend to that place.[5] But under a contract in a bill of lading to deliver goods "at —— station," the delivery must be made at the station to which the goods are consigned, even though it be beyond the company's own line.[6] So, also, a shipping contract, made with the officers of two connecting lines for through transportation, the proceeds of through shipments being divided between them, has been held to be a joint contract on the part of the companies, it appearing, also, that bills of lading were issued by their joint agent at the point of shipment.[7] And where several railroad companies, having connecting lines, associate themselves together, under a specific name, for the purpose of transporting

goods over their various roads, they are jointly and severally liable for the loss of any goods received by an agent authorized by them to give bills of lading, even though the bill of lading is made out merely in the name of the association.[8]

1 *Savannah, Florida & W. R. R. Co. v. Pritchard Matthews & Co.* (1887) 77 Ga. 412; 4 Am. St. Rep. 92; *Falvey v. Georgia R. R. Co.* 76 Ga. 597; 2 Am. St. Rep. 58; Southwestern R. R. Co. v. Thornton, 71 Ga. 61; Pereira v. Central Pacific R. R. Co. 66 Cal. 92.

2 *Merchant's Dispatch Transp. Co. v. Bloch Bros.* 86 Tenn. 392; 6 Am. St. Rep. 847.

3 The Thomas McManus, 24 Fed. Rep. 509. As to what may be shown in evidence on such an issue, see *Falvey v. Georgia R. R. Co.* 76 Ga. 597; 2 Am. St. Rep. 58.

4 Ortt v. Minneapolis & St. L. R'y Co. 36 Minn. 396.

5 Ortt v. Minneapolis & St. L. R'y Co. 36 Minn. 396.

6 Fortier v. Pennsylvania Co. 18 Ill. App. 260.

7 Swift v. Pacific Mail S. S. Co. 106 N. Y. 206.

8 Block v. Fitchburg R. R. Co. 139 Mass. 308. But see *Hot Springs R. R. Co. v. Frippe*, 42 Ark. 465, 48 Am. Rep. 65, where it was held, that an association, entered into by several carriers, for transmitting through freight, with an agreement to divide the profits, does not make them partners, nor create a joint liability for the goods so shipped.

§ 921. The carrier's liability as insurer.— While goods are in the custody of a railway company as a common carrier, it is subject to the full common-law liabilities attaching to common or public carriers; which is to say, that it is liable as an absolute insurer against loss or injury arising in any manner other than from one of the excepted causes.[1] It is not necessary to allege nor to prove negligence.[2] A railway company is liable for the destruction by fire, while in its charge, of cars which it has received for carriage from another company.[3]

1 McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; Harris v. North Indiana R. R. Co. 20 N. Y. 232; Kohannon v. Hammond, 42 Cal. 227; Lexford v. Smith, 52 N. H. 355; Williams v. Grant, 1 Conn. 487; Moses v. Morris, 4 N. H. 304; Harrell v. Owens, 1 Dev. & B. (N. C.) 273; Turner v. Wilson, 6 Yerg. (Tenn.) 340; Ewart v. Street, 2 Bail. (S. C.) 273; Wood's Railway Law, 1574. It is immaterial that a fire by which the goods were destroyed began elsewhere than on the carrier's premises, and that it made

every effort to put it out: Hyde v. Trent etc. Nav. Co. 5 Term Rep. 389; Forward v. Pettard, 1 Term Rep. 27.

2 McFadden v. Missouri Pacific R'y Co. 92 Mo. 343, and cases cited *supra*. *Cf.* Grogan v. Adams Express Co. 114 Pa. St. 523.

3 Missouri Pacific R'y Co. v. Chicago & A. R. R. Co. 25 Fed. Rep. 317.

§ 922. Exceptions to the carrier's liability as insurer.—The excepted causes of delay, injury or destruction, referred to in the preceding and other sections, are the act of God,[1] or of the public enemy,[2] the inherent vice of the thing itself,[3] and the act of the consignor or consignee, or their agents.[4]

1 Norris v. Savannah etc. R'y Co. (Fla. 1887) 1 R'y & Corp. Law J. 394. The term "act of God" embraces those causes of destruction not attributable, either directly or indirectly, to human agency: Nugent v. Smith, 1 Com. P. Div. 423; Nichols v. Marsland, Law R. 10 Ex. 258.

2 The term "public enemy" does not include thieves, rioters or insurgents: Jones on Bailments, 104. The term does not embrace the armies of States that had withdrawn from the federal compact, where, although their right to do so was denied, and their withdrawal was stigmatized as "rebellion," they were, nevertheless, from any point of view, to be regarded as governments, *de facto:* Nashville etc. R. R. Co. v. Estes, 10 Lea, 749.

3 Kendall v. London etc. R'y Co. Law R. 7 Ex. 373; Nugent v. Smith Law R. 1 Com. P. Div. 423. Such as its tendency to decay: Kendall v. London etc. R'y Co. Law R. 7 Ex. 373.

4 Butterworth v. Brownlow, 31 Law J. Com. B. 267; Rooth v. North Eastern R'y Co. Law R. 2 Ex. 173. As by improper packing: North Eastern R'y Co. v. Richardson, Law R. 7 Am. Com. P. 75. See, also, § 934 *infra*. Or by concealing value of goods by packing them as of little value: Sleat v. Fagg, 5 Barn. & Ald. 342; yet not so as to conceal their value from a dishonest servant of the carrier: Cradley v. Waterhouse, Moody & M. 154. Or holding out goods as an ordinary risk, when they are an extraordinary risk: Batson v. Donovan, 4 Barn. & Ald. 37; Walker v. Jackson, 10 Mees. & W. 16. Or by inducing the carrier's servants to accept goods on terms which he knows they have no authority to do so: Slim v. Great Northern R'y Co. 23 Law J. Com. P. 166; Belfast etc. R'y Co. v. Keys, 9 Hoffm. L. Cas. 556; Edward v. Sherratt, 1 East, 604; Harris v. Great Western R'y Co. 45 Law J. Q. B. 737.

§ 923. The same subject, continued. — Even though the loss or injury arose from one of the excepted causes, the carrier does not escape liability unless it has made every effort reasonably proportioned to the danger, and taken every practicable precaution to avert it.[1] And the burden of proof

is upon the carrier to show that it exercised such care and caution as would be employed by a prudent man to avert the danger of a loss occasioned by an act of God.[2] It cannot be expected, however, to take precautions against unprecedented dangers.[3]

1 Leck v. Maestaer, 1 Camp. 138; Oakley v. Portsmouth etc. Packet Co. 11 Ex. 618; Nugent v. Smith, 1 Com. P. Div. 423.

2 Davis v. Wabash, St. Louis etc. R'y Co. 13 Mo. App. 449.

3 Norris v. Savannah etc. R'y Co. (Fla. 1887), 1 R'y & Corp. Law J. 394, where, though the tracks of the company had been previously inundated, it was held not liable for injuries to perishable goods by reason of delay caused by an unprecedented flood.

§ 924. The carrier's liability as warehouseman. After the consignee of goods has been notified by the carrier, or has otherwise been affected with knowledge of their arrival, and a reasonable time for their removal has elapsed, the carrier's liability as insurer ceases, and its responsibility for the goods thenceforth is merely that of a warehouseman.[1] For the duty of a consignee to take goods is as imperative as that of the carrier to deliver them; and his acts cannot continue the stringent liability of the carrier as an insurer.[2] So, also, if the consignee refuse to accept the goods, for a reason not founded on any fault of the carrier, the latter thereupon becomes a warehouseman,[3] a mere involuntary bailee,[4] to preserve the goods for the consignor.[5] In such a case, it should notify the consignor, and hold the goods, subject to his orders; but it cannot properly return them to him without directions so to do.[6] As a warehouseman, the carrier is bound only to the exercise of reasonable care and prudence.[7] Thus, where goods are left in the carrier's custody, awaiting further or-

ders,[8] or where it has undertaken to keep them until called for,[9] or where they are retained by the carrier in accordance with a custom or order of the consignor or consignee, it is liable therefor only as warehouseman.[10] But it is liable as a common carrier for freight which it has stored in its warehouse to await the convenience of a connecting line.[11] A carrier keeping goods as a warehouseman is not a gratuitous bailee, for it may charge storage thereon; and it is, accordingly, liable for ordinary negligence resulting in loss or injury of the goods.[12] In determining what time should be reasonably allowed the consignee for the removal of his goods, the circumstances of each case are to be taken into consideration, the time of the arrival of the goods, and the facilities for removal obtainable at the place to which they were consigned. But the peculiar circumstances of the consignee himself are not to be considered.[13] A consignee is not bound to take goods away on a Sunday or a holiday.[14] But if he begin to take them away on the day before a holiday, he cannot hold the carrier liable, except as a warehouseman, if a portion of them left by him are destroyed by fire.[15]

1 *Tarbell v. Royal Exchange Shipping Co.* (1888) 110 N. Y. 170; 6 Am. St. Rep. 350; Gould v. Chapin, 20 N. Y. 259; Rowland v. Mills, 2 Hill, 150; National Line S. S. Co. v. Smart, 107 Pa. St. 492; Kennedy v. Mobile etc. R. R. Co. 74 Ala. 430; Alabama etc. R. R. Co. v. Kidd, 35 Ala. 209; Sholes v. Ackerland, 15 Ill. 474; Dean v. Vaccaro, 2 Head (Tenn.), 288; Mackenzie v. Cox, 9 Craig & P. 632.

2 Tarbell v. Royal Exchange Shipping Co. (1888) 110 N. Y. 170; 6 Am. St. Rep. 350.

3 Weed v. Barney, 45 N. Y. 344; 6 Am. Rep. 97.

4 Heugh v. London etc. R'y Co. Law R. 5 Ex. 51.

5 Wilson v. Royal Exchange Shipping Co. 24 Fed. Rep. 815.

6 Cranch v. Great Western R'y Co. 3 Hurl. & N. 133.

7 *Tarbell v. Royal Exchange Shipping Co.* (1888) 110 N. Y. 170; 6 Am. St. Rep. 350; Garside v. Trent Nav. Co. 4 Term Rep. 581; Cailiff v. Danvers, Peake, 114; Searle v. Laverick, Law R. 9 Q. B. 122; Harris v. Great

Western Ry Co. Law J. 4 Q. B. 139; Gillis v. McMullin, Law R. 2 P. C. 337; Hawkes v. Smith, Carmy & M. 72; Pinsonat v. Small, 1 Esp. 331.

8 Cairns v. Robbins, 8 Mees. & W. 258; Chapman v. Great Western Ry Co. 25 Eng. L. & Eq. R. 520.

9 National Line S. S. Co. v. Smart, 107 Pa. St. 482. *Cf.* Merchants' Despatch etc. Co. v. Morrison, 113 Ind. 5.

10 Carlisle v. Trent Nav. Co. 4 Term R. 581; In re Webb, 8 Taunt. 443.

11 Coxon v. Marquette etc. R. R. Co. 55 Mich. 238; 51 Am. Rep. 387.

12 White v. Humphery, 11 Q. B. 43; Cairns v. Robbins, 8 Mees. & W. 258.

13 Moses v. Boston & Maine R. R. Co. 32 N. H. 523; Leavenworth etc. R. R. Co. v. Maris, 25 Kan. 338; Hemmenthal v. Brainard, 38 Vt. 402; Williams v. Vermont etc. R. R. Co. 4 Vt. 760; Quintit v. Henshaw, 35 Vt. 605; Porter v. Chicago etc. R. R. Co. 51 Ill. 417; Alabama etc. R. R. Co. v. Kidd, 35 Ala. 209; Ohio etc. R. R. Co. v. Dunlevy, 6 Ill. 550; Wood v. Crocker, 75 Wis. 405; Dunbar v. Chicago etc. R. R. Co. 30 Wis. 489; Hirsch v. Cleiter Chy. 2 Duv. (Ky.) 44; Norris etc. R. R. Co. v. Ayres, 28 N. J. L. 317; Hoffman v. New Orleans etc. R. R. Co. 24 La. An. 336; Wood's Railway Law, 1592.

14 Russell Manuf. Co. v. New Haven Steamboat Co. 50 N. Y. 121.

15 Richardson v. Goddard, 23 How. 28.

§ 925. Of the carrier's obligations—(*a*). To receive and carry.—It is the duty of a common carrier to receive all such goods as it professes to carry, and to transport them on the same terms for all persons alike.[1] And for refusing or neglecting to receive or carry, it is answerable in damages to the party injured.[2] But a common carrier is not bound to take goods of a kind which it does not profess to carry;[3] nor goods improperly packed;[4] nor goods delivered at a place where it is not its custom to receive freight;[5] nor such as are delivered to it too late for loading.[6] It is under no obligation to carry, except upon regular trains.[7] And there is no duty incumbent upon it to carry perishable goods to the entire exclusion of freight not of a perishable nature.[8]

1 *Ayres v. Chicago etc. R'y Co.* (1878) 71 Wis. 372; 5 Am. St. Rep. 226; Central & M. R. R. Co v. Morris, 63 Tex. 43; Cranch v. London etc. R'y 14 Com. B. 225; Garton v. Exeter etc R'y Co. 1 Best & Smith, 112; Houston etc. R'y Co. v. Smith, 63 Tex. 322, decided under Tex. Rev. Stat. art.

But see Atchison etc. R. R. Co. v. Miller, 13 Neb. 661. *Cf.* Baltimore etc. R. R. Co. v. Adams' Express Co. 22 Fed. Rep. 404.

2 Central R. R. & B. Co. v. Logan, 77 Ga. 804; Central & M. R. R. Co. v. Morris, 69 Tex. 49; *Louisville N. A. & C. R'y Co. v. Flanagan*, 113 Ind. 488; 3 Am. St. Rep. 674.

3 McManus v. Lancashire etc. R'y Co. 4 Hurl. & N. 327.

4 Munster v. Southeastern R'y Co. 4 Com. B. N. S. 676; Hart v. Baxendale, 16 Law T. N. S. 396.

5 *Louisville N. A. & C. R'y Co. v. Flanagan*, 113 Ind. 488: 3 Am. St. Rep. 674.

6 Palmer v. London etc. R'y Co. Law R. 1 Com. P. 538: Garton v. Bristol etc. R'y Co. 1 Best & Smith, 412; Lane v. Cotton, 1 Ld. Raym, 652.

7 Donahoe v. London etc. R'y Co. 15 Week. R. 772.

8 *Dixon v. Chicago, Rock Island etc. R'y Co.* 64 Iowa, 531; 52 Am. Rep. 460.

§ 926. **"Strikes" as affecting the obligation to receive and carry.**—A common carrier is not excused from its obligation to receive and carry,[1] and to carry promptly,[2] by reason of a conspiracy between its employees to enforce their demands upon it by simultaneous cessation of work. In the celebrated "Freight Handlers Case," it was held that *mandamus* would issue to compel a railway to receive and transport freight, notwithstanding a "strike" of its servants.[3] For a railway company is a public servant, and nothing will be accepted as an excuse for failure to perform its public functions. The question then arises, however, whether its employees bear a like relation to the State, and whether they be not punishable for failure to perform a public function, in the same manner as deserting soldiers, mutinous sailors and jurymen who refuse to serve.

1 *People v. New York Central etc. R. R. Co.* (1883), 28 Hun, 543.

2 Geismer v. Lake Shore etc. R'y Co. 31 Hun, 50.

3 *People v. New York Central etc. R. R. Co.* (1883), 28 Hun, 543.

§ 927. (*b*). **To supply safe and suitable cars.**—It is the duty of the carrier to transport the goods committed to its charge in safety;[1] and to supply

cars suitable for the class of goods which it undertakes to carry.[2] If a railway company holds itself out to the public as a common carrier of live-stock, it is bound to furnish suitable cars for that purpose upon reasonable notice.[3] It is no defense to an action against a railway company for an injury to live-stock, sustained through its being shipped in a defective car, that the car belongs to another company operating a connecting line.[4] And a railway company, upon being sued for damages resulting to property in transportation, through the use of improper cars, will not be permitted to show that it has always used similar cars for the carriage of such property, although it may be the only road in the commonwealth engaged in transporting that particular class of property.[5] But there is no rule of law requiring a railroad company to provide refrigerator cars for perishable property, and it is for the jury to decide as to whether a failure to do so constitutes negligence.[6] And where a box is presented for shipment to a railway company, and it is too large to be put into an ordinary covered car, it may be carried on a platform car, due care being observed to keep it dry.[7]

1 Great Northern R'y Co. v. Taylor, Law R. 1 Com. P. 385; Amies v. Stevens, 1 Strob. 128; Great Western R'y Co. v. Blower, Law J. 41 Com. P. 263; Law R. 7 Com. P. 655, per WILLES J; Beal v. South Devon R'y Co. 3 Hurl. & C. 337.

2 Lyon v. Mells, 5 East, 428; Shaw v. York etc. R'y Co. 13 Q. B. 347; Beckford v. Crutwell, 5 Craig & P. 242; Combe v. London etc. R'y Co. 31 Law T. N. S. 613; Wood's Railway Law, 1582.

3 *Ayres v. Chicago etc. R'y Co.* (1888) 71 Wis. 372; 5 Am. St. Rep. 226; Hamilton v. Western etc. R. R. Co. 96 N. C. 398.

4 Wallingford v. Columbia & G. R. R. Co. 26 S. C. 258.

5 Leonard v. Fitchburg R. R. Co. 143 Mass. 307.

6 Udell v. Illinois Central R. R. Co. 13 Mo. App. 254.

7 Burwell v. Raleigh & G. R. R. Co. 94 N. C. 451.

§ 928. **The same subject, continued.**—Under the Wisconsin statute,[1] providing that "every railroad corporation shall, upon reasonable notice, when within its power to do so, furnish suitable cars to any person applying therefor, for the transportation of freight," the complaint in an action against a railroad company must show that reasonable notice was given, and that it was within the power of the company, at the time, to furnish suitable cars.[2] A carrier failing to furnish a shipper with cars, upon a reasonable notice, must immediately inform him of such failure, or compensate him for any loss occasioned by its failure.[3] The provision of the Illinois statute,[4] subjecting a railway company to treble damages for neglecting to supply cars for the carriage of such property as shall be presented for transportation within a reasonable time prior thereto, does not apply to a neglect to provide cars at a mine for coal to be dug and hoisted, subsequently to the furnishing of the cars.[5]

1 Wis Rev. Stat. § 1798.
2 Richardson v. Chicago & Northwestern R'y Co. 61 Wis. 596.
3 *Ayres v. Chicago etc. R'y Co.* (1883) 71 Wis. 372; 5 Am. St. Rep. 226.
4 Ill. Rev. Stat. ch. 114, §§ 84, 85.
5 Illinois & St. L. R. & C. Co. v. People, 19 Ill. App. 141.

§ 929. (c). **To separate goods injurious to each other.**—Goods which would be injurious to each other must not be stowed together;[1] but if the shipper fails to notify the carrier that the goods are of a kind likely to be injured by proximity to others, he cannot hold it liable for placing them together.[2]

1 Wood's Railway Law, 1583; Alston v. Herring, 11 Ex. 822.
2 Hutchinson v. Guion, 5 B. C. (N. S.) 149.

§ 930. (*d*). **To deliver to the right person at the designated place.**—It is the carrier's duty to deliver goods according to the directions of the consignor.[1] A failure to deliver them in accordance with the bill of lading, is at the carrier's risk.[2] It is liable also for a loss resulting from a departure from an established custom as to the place and manner of delivering goods.[3] If the carrier relies upon a custom as to the delivery of goods or upon the order of the consignee, it must follow the custom or instructions strictly to exonerate itself from liability.[4] It is said that no care or precaution against mistake will absolve the carrier from liability for a misdelivery;[5] unless it was caused by the acts of the consignor or the true consignee themselves.[6] Neither fraud, imposition, nor forgery, committed by the party obtaining the goods wrongfully, can be plead by the carrier as a defense in an action for misdelivery;[7] for it is its duty to demand evidence of the identity of a person claiming to be consignee.[8] Even when goods are ordered by the consignee in a fictitious name, the carrier is liable for delivering them to him without evidence as to his identity.[9] A wrongful delivery is, according to many authorities, a conversion, for which the carrier is liable in trover,[10] whether the misdelivery consist in delivering to the wrong person,[11] or at the wrong place.[12] But if by lapse of time the railway's liability has changed from that of a common carrier to the liability of a warehouseman, it is liable only for misdelivery resulting from negligence.[13] The burden, however, in such a case, is upon the company to show that it had ceased to be a carrier

and was holding the goods as warehouseman merely.[14] Where there is a statutory provision, as in California,[15] that in an action by a consignee against a carrier, for a wrongful delivery of goods in transit to a party other than the consignee, the measure of damages shall be the highest market value of the property at any time between the conversion and the verdict, without interest, and a fair compensation for the time and money properly expended in pursuit of the property, the consignee must show the circumstances under which the expenditure which he claims to have incurred, was made, in order to enable the court to decide whether or not it was proper.[16] Where a railway company was sued by the assignee of an insolvent debtor for a wrongful delivery of property to the consignee, after in olvency, and without demanding of him the proper vouchers, the measure of damages was held to be the market value of the property, less the charges for transportation, although the consignee had contracted with the assignee to pay the freight himself, and the assignment was known, even as to its terms, to the company.[17]

1 *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301; Stephenson v. Hart, 1 Moore & P. 357; 4 Bing. 676; Addison on Contracts, 810; Wright v. Northern Central R. R. Co. 8 Phila. 19; Ela v. American M. U. Exp. Co. 29 Wis. 611. *Cf.* Wabash etc. R'y Co. v. Jaggerman, 115 Ill. 407.

2 *Pennsylvania R. R. Co. v. Stern* (1888), 119 Pa. St. 24; 4 Am. St. Rep. 626.

3 Southern Express Co. v. Everett, 37 Ga. 688.

4 Baldwin v. American Express Co. 23 Ill. 197; Haslam v. Adams Express Co. 6 Bosw. 235.

5 *Houston etc. R. R. Co. v. Adams*, 49 Tex. 748, 30 Am. Dec. 116, where the delivery was to a person of the same name as the consignee, but at a different place; Meyer v. Chicago etc. R. R. Co. 24 Wis. 566; Winslow v. Vermont etc. R. R. Co. 42 Vt. 700; Stephenson v. Hart, 4 Bing. 476; American Express Co. v. Stack, 29 Ind. 27; Youl v. Harbottle, Peake, 68; Brown v. Hodgson, 4 Taunt. 189; Sanquer v. London etc. R'y Co. 16 Com. B. 163; McKean v. McIver, Law R. 6 Ex. 36; Heugh v. Lon-

don etc. R'y Co. Law R. 5 Ex. 51; Cork Distilleries Co. v. Great Southern etc. R'y Co. 5 Ir. Rep. Com. L. 177.

6 Dobbin v. Michigan Central R. R. Co. 56 Mich. 522; Price v. Oswego & S. R. R. Co. 50 N. Y. 213; Heugh v. London etc. R'y Co. Law R. 5 Ex. 50.

7 McEntee v. New Jersey Steamboat Co. 45 N. Y. 34; Guilliame v. Packet Co. 42 N. Y. 212; Hempstead v. New York Central R. R. Co. 28 Barb. 435; Rogers v. Weir, 34 N. Y. 463; Ostrander v. Brown, 15 Johns. (N. Y.) 40; Willard v. Bridge, 41 Barb. 361; Dudley v. Hawley, 40 Barb. 307; Tuttle v. Gladding, 2 Smith E. D. 157; American Merchants' Express Co. v. Milk, 73 Ill. 224; Dufour v. Murphy, 37 Miss. 577; Dean v. Vacarro, 2 Head, 485; Gui lame v. Hamburgh Co. 42 Vt. 212; Hawkins v. Hoffman, 6 Ill. 535; Duff v. Budd, 3 Brod. & B. 177; Powell v. Myers, 25 Wend. 295; *Southern Express Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; Devereaux v. Barclay, 2 Barn. & Ald. 702; Lubback v. Inglis, 1 Stark, 104; Carroll v. Mix, 57 Barb. (N. Y.) 215; Roberts v. Riley, 15 La. An. 103; Burrell v. North, 2 Car. & K. 680; Bradley v. Waterhouse, 3 Craig & P. 318; Packard v. Getman, 4 Wend. (N. Y.) 615; Michigan Central R. R. Co. v. Day, 20 Ill. 375; Ball v. Liney, 48 N. Y. 6; *Wilson v. Vermont Central etc. R. R. Co.* 42 Vt. 290; 1 Am. Rep. 365; Gosling v. Higgins, 1 Camp. 451; Stephenson v. Hart, 4 Bing. 476, Chapman v. New Orleans etc. R. R. Co. 21 La. An. 221; Ten Eyck v. Harris, 47 Ill. 288; McKean v. McIver, Law R. 6 Ex. 36; *Meyer v. Chicago etc. R. R. Co.* 24 Wis. 566; 1 Am. Rep. 207; Jones v. Earl, 37 Cal. 630; The Ben Adams, 2 Ben. (U. S. Cir. Ct.) 445; Jeffersonville R. R. Co. v. White, 6 Bush, 251; Dunlap v. Hunting, 2 Denio, 643.

8 Watt v. Porter, 2 Mason (U. S. Cir. Ct.) 77; Sargent v. Gile, 8 N. H. 325; Leighton v. Shapley, 8 N. H. 359; Dent v. Chiles, 5 Stewt. & P. 383; Duff v. Budd, 3 Ball & B. 177; American Express Co. v. Fletcher, 25 Ind. 492; *Southern Express Co. v. Van Meter*, 17 Fla. 783; 35 Am. Rep. 107; American Express Co. v. Stack, 29 Ind. 27.

9 Price v. Oswego etc. R. R. Co. 50 N. Y. 213; *Winslow v. Vermont R. R. Co.* 42 Vt. 700. But see Dunbar v. Boston etc. R. R. Co. 110 Mass. 26.

10 *Gibbons v. Farwell* (1886), 63 Mich. 344; 6 Am. St. Rep 301: Claflin v. Boston etc. R. R. Co. 7 Allen, 341; Viner v. New York S. S. Co. 50 N. Y. 23.

11 *Winslow v. Vermont etc. R. R. Co.* 42 Vt. 700.

12 Perkins v. Smith, 1 Wills. 328; Youl v. Harbottle, Peake N. P. C. 68; Devereaux v. Barclay, 2 Barn. & Ald. 702; Stephen v. Elwall, 4 Moore & S. 253. But see Ross v. Johnson, 5 Burr, 2825. *Cf.* Bonney v. The Huntress, 4 Hunt's Merch. Mag. 83; The Ben Adams, 2 Ben. (U. S. Cir. Ct.) 445; *Meyer v. Chicago etc. R. R. Co.* 24 Wis. 586.

13 Witbeck v. Holland, 45 N. Y. 13.

14 Neal v. Wilmington & Weldon R. R. Co. 8 Jones (N. C.), 482; Fenner v. Buffalo etc. R. R. Co. 44 N. Y. 505; Fisk v. Newton, 1 Denio, 45; Weed v. Barney, 45 N. Y. 344; Kremer v. Southern Express Co. 6 Coldw. 356; Hudson v. Baxendale, 2 Hurl. & N. 575.

15 Cal. Civ. Code, § 3336.

16 Wells, Fargo & Co. v. Oregon R'y & Nav. Co. 32 Fed. Rep. 51.

17 Massachusetts Loan and Trust Co. v. Fitchburg R. R. Co. 143 Mass. 318.

§ 931. The same subject, continued. — Rival claimants. — A railway company is not liable for

failing to deliver goods to the consignee, when its failure is caused by due process of law, as where an attachment is regularly levied upon the property while in its custody.[1] But it must, in order to relieve itself from liability for conversion, show that the officer taking the goods had authority to do so;[2] and the legal proceedings, upon which the officer's writ was based, should be put in evidence.[3]

1 Pingree v. Detroit etc. R. R. Co. (Mich. 1887, not yet reported); Lemont v. New York etc. R. R. Co. 28 Fed. Rep. 920, under Pa. Act of June 13, 1874.

2 *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301. *Cf. Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24; 4 Am. St. Rep. 626, and note.

3 *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301.

§ 932. *(e)*. **To deliver within a reasonable time.** The common carrier is bound to carry and deliver goods committed to it with reasonable promptness, and any unreasonable delay is a breach of its contract.[1] Thus, a railway company, accepting perishable property for shipment during the winter season, must use great diligence in forwarding it with dispatch; and if it is damaged by freezing, through a delay in being delivered over to a subsequent carrier, the company is liable.[2] In the absence of any explanation thereof, a failure to deliver freight for seventy days has been held to be an unreasonable delay, and to subject the carrier to damages.[3] It cannot excuse its delay in transportation by the fact that a bridge on its line gave way, and that it had to make shipments by another line;[4] nor does the fact that it received freight on Sunday, excuse its failure to transport with promptness;[5] nor is it excused for a delay in transportation by a strike by its employees.[6] If it has contracted to deliver within a certain time, nothing will excuse its fail-

ure so to do.[7] A failure on the part of a carrier to make a prompt delivery of goods, entitles the consignee to maintain an action for damages actually resulting from such negligence, but not for a conversion of the goods.[8]

1 St. Louis, I. M. etc. R'y Co. v. Heath, 41 Ark. 476; Berjie v. Texas & P. R'y Co. 37 La. An. 468; Hewett v. Chicago, R. etc. R'y Co. 63 Iowa, 611; Donahue v. London etc. R'y Co. 15 Week. R. 792; Hughes v. Great Western R'y Co. 14 Com. B. 637; Raphael v. Pickford, 5 Macn. & G. 55; Davis v. Garrett, 6 Bing. 725.

2 Hewett v. Chicago etc. R'y Co. 63 Iowa, 611.

3 St. Louis, I. M. etc. R'y Co. v. Heath, 41 Ark. 476.

4 Guinn v. Wabash, S. L. etc. R'y Co. 20 Mo. App. 453.

5 Guinn v. Wabash, S. L. etc. R'y Co. 20 Mo. App. 453.

6 Grismer v. Lake Shore & Michigan Southern R'y Co. 34 Hun, 50

7 Donahoe v. London etc. R'y Co. 15 Week. R. 792; Pickford v. Grand Junction R'y Co. 12 Mees. & W. 766.

8 St. Louis, I. M. etc. R'y Co. v. Mudford, 44 Ark. 439.

§ 933. The same subject, continued—Presumption as to reasonableness of time.—The determination of what constitutes a reasonable time for the delivery of freight is for the jury, in view of the peculiar circumstances of each case,[1] the usual time being *prima facie* evidence of what is reasonable.[2] This presumption, however, may be rebutted,[3] as, for example, by showing that the delay was necessary for the safety of the goods;[4] that a part of the railway track was carried away by a freshet;[5] that the track was so obstructed by heavy drifts of snow, that it could not be cleared without extraordinary expense;[6] that the delay occurred through an obstruction resulting from the negligence of another carrier having running privileges over the defendant's road;[7] or that, although it had sufficient facilities for ordinary traffic, it was taken unprepared by an extraordinary influx of freight.[8] And it may, by special contract, exempt

itself from liability, for failure to deliver within the usual time. Accordingly, a stipulation that it shall not be liable for non-delivery within any certain or definite time, has been held to excuse an otherwise unreasonable delay.[9]

1 Illinois Central R. R. Co. v. Haynes, 64 Miss. 604; Wren v. London etc. R'y Co. 1 Law T. N. S. 5; Hales v. London etc. R'y Co. 4 Best & Smith, 66; Briddon v. Great Northern R'y Co. 28 Law J. Ex. 51; Broadwell v. Butler, 6 McLean (U. S.), 296.

2 Great Northern R'y Co. v. Taylor, Law R. 1 Com. P. 385.

3 *Vide* cases cited *infra*.

4 Davis v. Garrett, 6 Bing. 725.

5 Lipford v. Charlotte R. R. Co. 7 Rich. (S. C.) 409.

6 Great Northern R'y Co. v. Taylor, Law R. 1 Com. P. 385.

7 Taylor v. Great Northern R'y Co, 1 Law R. Com. P. 385.

8 Illinois Central R. R. Co. v. Haynes, 64 Miss. 604; Wallace v. Great Southern etc. R'y Co. 17 Week. Rep. 464; Angell on Carriers, 252.

9 Hughes v. Great Western R'y Co. 14 Com. B. 637.

§ 934. (*f*) **In respect of "leaks and outs."**—While a carrier is not ordinarily liable for deterioration in the quality of goods nor for diminution in quantity, resulting from defective casks or packing,[1] it must do whatever is reasonably in its power to save them from injury or loss of that kind;[2] so that it may be held liable where, knowing of the leakage of liquids, it failed to make any efforts to arrest it.[3] And if it receive goods evidently packed improperly, it will be held responsible therefor, the improper packing only going to reduce the amount of the damages recoverable,[4] for carrying in a manifestly improper condition is equivalent to carrying without due care.[5] Evidence of diminution in quantity is sufficient to throw the burden upon the carrier of proving that it was not negligent.[6] It may, however, contract against liability for leakage and other similar loss. But, where a bill of lading provided that, "in the event of loss or damage,

under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same," the shipper was held not bound by an interpretation on the part of the railway company of the illegibly written characters, "L. & O. Ex. 20 R. R. val." to mean "leaks and outs excepted, $20 railroad valuation."[7]

1 Hudson v. Baxendale, 6 Week. Rep. 83; Davidson v. Gwynne, 12 East, 381; Barbour v. South Eastern R'y Co. 34 Law T. N. S. 67; Murrell v. Larkin, Law J. 1 Com. P. 2; Richardson v. North Eastern R'y Co. 7 Law R. Com. P. 74.

2 Davidson v. Gwynne, 12 East, 381.

3 Cox v. London etc. R'y Co. 3 Fost. & F. 77; Beck v. Evans, 16 East, 244.

4 Higginbotham v. Great Northern R'y Co. 10 Week. Rep. 358.

5 Stuart v. Crawley, 2 Stark. 323; Richardson v. North Eastern R'y Co. Law R. 7 Com. P. 74.

6 Hawkes v. Smith, Cromp. & M. 72.

7 *Rosenfeld v. Peoria, D. etc. R'y Co.* 103 Ind. 121; 53 Am. Rep. 500.

§ 935. (*g*). **In respect of live-stock shipments—Duty to supply safe and suitable cars.**—A carrier of live-stock assumes in relation to them the common-law obligations attaching to common carriers, subject, however, to the modification that it is not an insurer against injuries resulting without its fault, but from the inherent nature or propensities of the animals themselves.[1] And even from injuries resulting from this cause, the carrier must exercise due care to preserve them.[2] It is bound to supply cars suitable for the purpose, upon reasonable notice being given of the intended shipment of live-stock.[3] A *prima facie* case of liability for injury to live-stock is made out by proof f shipment and injury;[4] and the burden of proof upon the carrier, to show that it exercised due re, and that their injury or death resulted from

the inherent propensities of the animals, without the contributory fault of the carrier.[5]

1 *Lindsley v. Chicago etc. R'y Co.* 36 Minn. 539; 1 Am. St. Rep. 692; Moulton v. St. Paul etc. R'y Co. 31 Minn. 85; 47 Am. Rep. 781; *Gulf etc. R'y Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494; *Ayres v. Chicago etc. R'y Co.* (1888) 71 Wis. 372; 5 Am. St. Rep. 226; Wheeler's "Modern Law of Carriers," 98. *Cf.* McFadden v. Missouri Pacific R'y Co. 92 Mo. 343 as to the make-up of a train containing cars in which live-stock with straw bedding are carried.

2 Wheeler's "Modern Law of Carriers," 100, 101, citing Clarke v. Rochester etc. R. R. Co. 14 N. Y. 570, where a horse, being tied by a halter to the side of a car, fell and was choked; and the evidence tended to show that had the car been inspected from time to time, the horse could have been saved.

3 *Ayres v. Chicago etc. R'y Co.* (1888) 71 Wis. 372; 5 Am. St. Rep. 226; Hamilton v. Western etc. R. R. Co. 96 N. C. 398.

4 Wallingford v. Columbia & G. R. R. Co. 26 S. C. 258; *Lindsley v. Chicago, M. & St. P. R. R. Co.* (1887), 36 Minn. 539; 1 Am. St. Rep. 692; *Merchants' Dispatch Transp. Co. v. Bloch Bros.* (1887), 86 Tenn. 392; 6 Am. St. Rep. 847.

5 *Lindsley v. Chicago etc. R'y Co.* 36 Minn. 539; 1 Am. St. Rep. 692.

§ 936. Additional duties of carriers of live stock.—Special arrangements.—A carrier of live stock is under a further obligation to attend to the natural wants of animals during a long journey, and if they perish or are injured in market value through its failure so to do, it is liable therefor in damages.[1] It has been said, that, if necessary, it should feed and water them.[2] This, however, cannot be regarded as settled law;[3] and it has been held that no such obligation on the carrier's part is implied from a stipulation that the owners should feed and water them in case of accident or delay.[4] If they be suffering from heat, and douching them with water prove ineffectual to arrest mortality among them, the carrier should take other measures to preserve them from perishing.[5] What should be done under such circumstances, is a question for the jury, and expert testimony is admissible as to the course which should have been pursued.[6] The

carrier, however, may by special contract exempt itself from its common-law liabilities, in this regard,[7] and also, with respect to loading and unloading the cattle.[8] Under such contracts it remains liable only for negligence, and the burden of proving negligence is upon the plaintiff.[9] Thus, a cattle dealer, having expressly agreed in a contract with a railroad company for the transportation of his cattle, to assume the responsibility of loading and unloading, is estopped from suing the company for negligence in not providing with bedding a car which he has without objection accepted, and loaded with full knowledge as to its condition.[10] So, in another case, where a shipper of stock contracted to do the loading himself, and his servants allowed the train to start without having first shut the door of a car, and thereupon, a steer jumped out and was injured, the railway company was held exempt from liability.[11] But where a shipper agrees to accompany and to assume the risk of feeding and watering his stock, proper facilities for so doing must be supplied him by the carrier.[12] Where there is a statutory provision, as in Georgia,[13] raising a presumption of negligence on the part of a railway company in cases of injury to persons and property, it will apply to shipments of stock, even under special contracts limiting liability.[14]

1 *Lindsley v. Chicago etc. R'y Co.* 36 Minn. 539; 1 Am. St. Rep. 692; *East Tennessee etc. R. R. Co. v. Johnson*, 75 Ala. 596; 51 Am. Rep. 489; *Grey v. Mobile T. Co.* 55 Ala. 387; 28 Am. Rep. 729.

2 Taff Vale R'y Co. v. Giler, Law R. Q. B. 43; Great Northern R'y Co. v. Swaffield, Law R. 9 Ex. 132.

3 Wheeler's "Modern Law of Carriers," 102, and cases there cited.

4 Louisville & N. R. R. Co. v. Trent, 11 Lea, 82.

5 *Lindsley v. Chicago etc. R'y Co.* 36 Minn. 539; 1 Am. St. Rep. 692. *Lindsley v. Chicago etc. R'y Co.* 36 Minn. 539; 1 Am. St. Rep. 692. Wabash etc. R'y Co. v. Pratt, 15 Ill. App. 177.

8 *East Tennessee etc. R. R. v. Johnson*, 75 Ala. 596; 51 Am. Rep. 489; Newby v. Chicago etc. R'y Co. 19 Mo. App. 391.

9 *Pennsylvania R. R. Co. v. Raiordon* (1838), 19 Pa. St. 577; 4 Am. St. Rep. 670.

10 *East Tennessee, Virginia etc. R. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 439.

11 Newby v. Chicago R. I. & P. R'y Co. 19 Mo. App. 391.

12 Wabash, St. Louis etc. R'y Co. v. Pratt, 15 Ill. App. 177.

13 Ga. Code, § 3033.

14 Columbus & W. R'y Co. v. Kennedy, 78 Ga. 646.

§ 937. (*h.*) **In respect of stoppage in transitu.**—Carriers by rail are under the same common-law obligation as other carriers to obey the instructions of the consignor in respect of stoppage *in transitu*.[1] It will be remembered that this right arises only in favor of a consignor who has sold the goods on credit, upon learning of the insolvency of his vendee; that it exists only while the goods are in transit;[2] and that it is lost by actual or constructive delivery to the consignee;[3] as where, the transit being over, the company has consented to hold the goods in the capacity of warehouseman, subject to the consignee's orders, and not as a common carrier.[4] But a partial delivery is not a constructive delivery of the whole unless it has been made in the course of delivering the whole, and has been accepted by the consignee as a constructive delivery of the whole.[5]

1 For examples, see *Allen v. Maine Central R. R. Co.* 79 Me. 327; 1 Am. St. Rep. 310; Poal v. Columbia etc. R. R. Co. 23 S. C. 286. See further, as to the general common-law right of stoppage *in transitu*: *Lickbarrow v. Mason*, 1 Smith's Lead Cas. (Eng. ed.) 699; Tucker v. Humphrey, 4 Bing. 519.

2 Story on Bailment, § 561; Wood's Railway Law, 1533; Hedges v. Hudson River R. R. Co. 6 Rob. (N. Y. Super. Ct.) 119; Solomon v. Philadelphia etc. S. Co. 2 Daly (N. Y. C. P.) 104; *Winslow v. Vermont Central R. R. Co.* 42 Vt. 700. That the right is confined to the unpaid vendor, see Kinloch v. Craig, 3 Term. Rep. 783; Siffken v. Wray, 6 East, 371; Street v. Pym, 1 East. 4. That the vendor's factor or agent may exercise the right in his behalf, see Feise v. Wray, 3 Term. Rep. 783; Van Casleet v. Booker, 18 Law J. Ex. 17; The Tigress, 32 Law J. Adm. 97; Newson v. Thornton, 6 East, 17; Northey v. Field, 2 Esp. 613; Bailey v. Culverwell, 8 Barn.

& C. 448. But that notice by an unauthorized person will not be effectual unless ratified by the vendor within the time in which he himself might have given notice, see Bird v. Brown, 4 Ex. 786.

3 Mills v. Ball, 2 Bos. & P. 461; Whitehead v. Anderson, 9 Mees. & W. 518; London etc. R'y Co. v. Bartlett, 7 Hurl. & N. 400; Foster v. Frampton, 6 Barn. & C. 107; Oppenheim v. Russel, 3 Bos. & P. 54; Blum v. Marks, 21 La. An. 458; Howe v. Stewart, 40 Vt. 145; Wenger v Bernhardt, 55 Pa. St. 300; Thompson v. Baltimore etc. R. R. Co. 25 Md. 393; Schmertz v Dwyer, 53 Pa. St. 335; Wentworth v. Outhwaite, 10 Mees. & W. 450; James v. Griffin, 2 Mees. & W. 633.

4 Bolton v. Lancashire etc R'y Co. Law R. 1 Com. P. 431: Ex parte Barrow re Worsdell, 25 Week. R. 466; James v. Griffin, 2 Mees. & W. 623; Valpy v. Gibson, 4 Com. B. 837. See further, upon the question whether the carrier's custody has been changed to that of a warehouseman: Whitehead v. Anderson, 9 Mees. & W. 535; Coventry v. Gladstone, Law R. 6 Eq. 44; Scott v. Pettit, 3 Bos. & P. 439; Rowe v. Pickford, 8 Taunt. 83; Allan v. Gripper, 2 Cromp. & J. 218; Foster v. Frampton, 2 Barn. & C. 107.

5 Bolton v. Lancashire & Yorkshire R'y Co. Law R. 1 Com. P. 431; Ex parte Cooper re M'Laren, 11 Ch. Div. 68; Ex parte Gibbs re Whitworth, 1 Ch. Div. 101; Wood's Railway Law, 1586.

§ 938. The same subject, continued.—The right of stoppage *in transitu* is not lost by a part payment of the purchase-money;[1] nor by the consignee's acceptance of a draft therefor;[2] nor by the consignee's sale of the goods while they are in transit.[3] The notice to the carrier to hold the goods must be given at such a time, and under such circumstances, that it may, by the exercise of reasonable diligence, communicate it to its servants in time to prevent delivery of the goods.[4] But no particular form of notice is required to render the carrier liable for failure to hold the goods.[5]

1 Hodgson v. Say, 7 Term R. 446.

2 Edwards v. Brewer, 2 Mees. & W. 375; Kinloch v. Craig, 3 Term R. 783; Feise v. Wray, 3 East, 93.

3 Ex parte Cooper, 11 Ch. Div. 68; Wood's Railway Law, 1584.

4 Whitehead v. Anderson, 9 Mees. & W. 518.

5 *Allen v. Maine Central R. R. Co.* 79 Me. 327; 1 Am. St. Rep. 310

§ 939. The carrier's right to compensation, nd its lien to secure payment.—The carrier is enled to compensation for the transportation of

goods.[1] But where goods marked for transportation by way of a particular line, are sent by an intervening carrier over a different line, the latter cannot recover for the carriage, and will have no lien on the goods therefor, the marks being admissible as evidence of the shipper's intention.[2] The right to compensation is not lost by the destruction or injury of the goods by any of those casualties against which it is not an insurer, except where the agreement is for payment when the goods have been transported to their destination; in which case charges are collectable only upon so much as is delivered.[3] A stipulation in a bill of lading for the delivery of the full amount of goods specified therein, the carrier to make up for any deficiency, "and any excess to be paid for to the carrier by the consignee," was held to entitle the carrier to freight on the excess, but not to the excess itself.[4] To secure the payment of its charges, the carrier has a lien upon the goods so long as they remain in its custody. But its lien is lost by delivery.[5] If part of the goods has been delivered, the lien remains upon the residue in the carrier's custody.[6] The carrier's lien is superior to the bailor's right of stoppage *in transitu*, and also to an execution or attachment levied by a rival claimant.[7] But no lien exists in favor of a railroad company for demurrage on property transported by it, unless there be a special contract to that effect.[8] There is a statutory provision in Georgia,[9] requiring an affidavit of foreclosure of a common carrier's lien to contain an affirmative statement of a demand for payment of the claim secured by the lien having been made after the debt became due, and, in

the absence of such a statement, authorizing a dismissal of the foreclosure proceedings.[10] Defects in foreclosure proceedings may be taken advantage of by objection, even after the filing of the counter-affidavit by the carrier, and the sale of the property upon which the lien is claimed.[11] A collector of customs, when notified of the lien, must give the carrier reasonable notice before delivering goods to the consignee.[12]

1 *Vide* cases cited *infra*.

2 Bird v. Georgia R. R. Co. 72 Ga. 655.

3 Wood's Railway Law, 1581, 1562, citing Abbott on Shipping, 409, 415; Andrew v. Moorhouse, 5 Taunt. 425; 1 Marsh. 122; Osgood v. Groning, 2 Camp. 466; Cook v. Jennings, 7 Term R. 381; Mashiter v. Buller, 1 Camp. 81; Clark v. Drinsina, 1 Marsh. 123; Blakeley v. Dixon, 2 Bos. & P. 321; Cargo ex Galam, 2 Moore P. C. C. N. S. 216; Law J. 33 Adm. 97; Vlierboom v. Chapman, 13 Mees. & W. 230; Hunter v. Prinsep, 10 East, 378; Swett v. Black, 2 Sprague (U. S. Cir. Ct.). 49; The Excelsior, 2 Ben. (U. S. Cir. Ct.), 434; Seers v. Linseed, 1 Cliff. (U. S. Cir. Ct.), 68; Donahoe v. Kettell, 1 Cliff. (U. S. Cir. Ct.), 135; Hart v. Shaw, 1 Cliff. (U. S. Cir. Ct.), 358; Fox v. Nott, 6 Hurl. & N. 630; Shepherd v. De Bernales, 13 East, 567; Penrose v. Wilks, Abbott on Shipping, 415; Tapley v. Martin, 8 Term R. 445; Christie v. Rowe, 1 Taunt. 300.

4 Ford v. Head, 34 Hun, 146.

5 Geneva etc. R. R. Co. v. Sage, 35 Hun, 95.

6 Lane v. Old Colony R. R. Co. 14 Gray, 143; Fuller v. Bradley, 25 Pa. St. 120; Briggs v. Martin, 13 Mon. B. 239.

7 Chandler v. Belden, 18 Johns. 157; Raymond v. Tyron, 17 How. 53.

8 East Tennessee etc. R. R. Co. v. Hunt, 15 Lea, 261.

9 Ga. Code, § 1991.

10 Central Railroad & Banking Co. v. Sawyer (1887), 78 Ga. 784.

11 Central Railroad & Banking Co. v. Sawyer (1887), 78 Ga. 784.

12 Act of Congress of June 10, 1880, § 10. See, as to the liability of customs officers under this act, Cleveland etc. R. R. Co. v. McClung, 119 U. S. 454.

§ 940. Payment of charges in advance—Waiver.—A common carrier is under no obligation to receive and transport goods if its demand for payment in advance be refused by the shipper.[1] If, however, it accept the goods without demanding repayment, it must carry them to their destina-

tion; for it may look to the consignee for payment;[2] and since, in any event, it is secured from loss by its lien upon the goods themselves.[3]

1 Pickford v. Grand Junction R'y Co. 8 Mees. & W. 372; Barnes v. Marshall, 13 Q. B. 735; Wyld v. Pickford, 8 Mees. & W. 448; Botson v. Donovan, 4 Barn. & Ald. 28.

2 Barnes v. Marshall, 13 Q. B. 785.

3 Barker v. Hanens, 17 Johns. (N. Y.) 234; Wilson v. Grand Trunk R. R. Co. 53 Me. 60; Rucker v. Donovan, 13 Kan. 231; Langworthy v. New York etc. R. R. Co. 2 Smith E. D. 195; Bowman v. Hilton, 11 Ohio, 303; Hunt v. Haskell, 24 Me. 339; Sullivan v. Park, 33 Me. 438; Wood's Railway Law, 1581.

§ 941. **Excessive charges.**—The carrier's charges must not only be the same for all shippers of the same class of goods, but they must be in themselves reasonable and fairly proportioned to the services rendered. This is the rule not only at common law, but also under the statutes of many of the States.[1] And if an excessive and illegal charge be made, the shipper may recover the excess in an action for money had and received,[2] even though it were not paid under protest.[3] And where the only outlet for the transportation of a commodity is over a single railroad, any excess above the legal rates for freight, paid to obtain such transportation, is recoverable, even though paid subsequently to each shipment.[4] In such a case it is not necessary to show a demand for repayment before instituting suit.[5] In determining whether charges for transportation over connecting lines exceed the maximum allowed by statute, it is proper to deduct terminal charges for transhipment, elevator, and demurrage, rendered necessary by the connection between the lines.[6] Where a railway company is sued for the penalties for overcharges on freight, it cannot plead by way of

defense a special contract with the shipper at lawful rates, nor is the shipper confined in his remedy to an action for breach of the contract.[7] But it is a good defense to an action for an overcharge for freight, that the shipper fraudulently represented the goods to be of a lower class than in fact they were.[8] Where there is a statute, as in Arkansas,[9] forbidding railway companies to charge more freight than is specified in the bill of lading, and attaching a penalty of the amount of the freight charges for every day after payment or tender of the legal charges during which they shall withhold delivery, it is a company's duty, where the bill of lading does not specify the weight of the goods, to weigh them within a reasonable time, and to ascertain the charges, in accordance with the rates specified in the bill of lading, and upon failure so to do, and a refusal to deliver the goods, it will be held liable to the penalty.[10] A complaint under the Missouri statute,[11] seeking treble damages for unlawful charges for freight, on a shipment of "saw-logs," was held sufficient, without a specific allegation that the logs were "heavy articles" of the fourth class, according to that section of the statute determining the rates, since notice would be taken by the court of the meaning of "saw-logs."[12]

1 East Tennessee etc. R. R. Co. v. Hunt, 15 Lea, 261; *Killmer v. New York Central etc. R. R. Co.* 100 N. Y. 395; 53 Am. Rep. 194; where, however, it was held that illegal charges paid without protest are not recoverable.

2 *Peters v. Scioto and H. Valley R. R. Co.* 42 Ohio St. 275; 51 Am. Rep. 814; Heiserman v Burlington etc. R'y Co. 63 Iowa, 732; Mobile etc. R. R. Co. v. Steiner, 61 Ala. 559; Graham v. Milwaukee etc. R. R. Co. 53 Wis. 473; Great Western R'y Co. v. Sutton, Law R. 4 H. L. Cas. 226.

3 Heiserman v. Burlington etc. R'y Co. 63 Iowa, 732. *Contra*, Dubois v. Georgia etc. R. R. Co. 50 Ga. 304; Killmer v. New York Central c. R. R. Co. 100 N. Y. 395; 53 Am. Rep. 194.

4 West Virginia Transfer Co. v. Sweetzer, 25 W. Va. 434.

5 West Virginia Transfer Co. v. Sweetzer, 25 W. Va. 434.
6 Owen v. St. Louis & S. F. R'y Co. 83 Mo. 454.
7 Reynolds v. Chicago & H. R. R. Co. 85 Mo. 90.
8 Fry v. Louisville, N. A. & C. R'y Co. 103 Ind. 265.
9 Ark. Act of Feb. 17, 1885.
10 Little Rock & F. S. R'y Co. v. Hanniford, 79 Ark. 291.
11 Mo. Stat. 1879, §§ 834, 835.
12 Burkholder v. Union Trust Co. 82 Mo. 572.

§ 942. State regulation of rates — Railway commissions.—When natural persons or corporations are engaged in a public employment, the legislature has power to prescribe what charges they may reasonably make for the services rendered.[1] This power has been frequently exercised by American legislatures, and upheld as constitutional by the courts,[2] where it has not infringed upon the power delegated to Congress by the States, to regulate commerce between them.[3] It is held that what the legislature may do directly in this regard, may also be done through the medium of a railway commission; and that this in no way impairs the obligation of a contract of incorporation, which empowered the company "from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation," and "to alter and change" the same "at pleasure."[4] A general act, fixing a maximum rate for the carriage of goods and passengers by rail, applies to all railroads throughout the State, irrespective of any implication to the contrary from their charters or the acts of previous legislatures.[5] If this power of the State "can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent."[6] Regulations as to the rates for the carriage of passengers, made by railway

commissioners, have no reference to passengers on freight trains.[7]

1 *Munn v. Illinois*, 94 U. S. 113; Laurel Fork etc. R. R. Co. v. West Virginia Transp. Co. 25 W. Va. 324; West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 434; Ruggles v. Illinois, 108 U. S. 562; *Stone v. Wisconsin*, 94 U. S. 181; Chicago, B. & Q. R. R. Co. v. Iowa, 94 U. S. 155; Peik v. Chicago & N. R. R. Co. 94 U. S. 164; Chicago, M. & St. P. R. R. Co. v. Ackley, 94 U. S. 179; Winona & St. P. R. R. Co. v. Blake, 94 U. S. 180.

2 Tex. Rev. Stat. art. 4257; Oregon Act of Feb. 20, 1885; Mo. Stat. (1879), §§ 834, 835. *Vide* cases cited *supra*.

3 Ex parte Koehler, 25 Fed. Rep. 73.

4 *Stone v. Farmers' Loan and Trust Co.* 116 U. S. 307; *Stone v. Illinois Central R. R. Co.* 116 U. S. 347; *Stone v. New Orleans and N. R. R. Co.* 116 U. S. 352. These cases are designated "The Railroad Commission Cases."

5 Chicago etc. R. R. Co. v. Iowa, 94 U. S. 526; *Providence Bank v. Billings*, 4 Peters, 514, 516; Railroad Co. v. Maryland, 21 Wall. 456; Hare's American Constitutional Law, 667; Laurel Fork etc. R. R. Co. v. West Virginia Transp. Co. 25 W. Va. 324; West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 434; *Stone v. Farmers' Loan and Trust Co.* 116 U. S. 307; *Stone v. Illinois Central R. R. Co.* 116 U. S. 347; *Stone v. New Orleans etc. R. R. Co.* 116 U. S. 352; Owen v. St. Louis etc. R'y Co. 83 Mo. 454.

6 *Providence Bank v. Billings*, 4 Pet. 514, 561.

7 Partee v. Georgia R. R. Co. 72 Ga. 347.

§ 943. Unjust discrimination.—For any unjust discrimination between shippers, either in the facilities furnished or in the tariffs charged, a common carrier is answerable in damages to the person thereby injured.[1] The fact that one person ships a larger quantity of freight than other shippers, will not justify a discrimination in rates in his favor.[2] But it is said not to be illegal for a carrier of live stock to compensate a shipper for his services by allowing him a percentage of the total receipts from all cattle carried by the road.[3] Contracts by which a common carrier agrees to furnish better facilities to one class of shippers, or to carry at lower rates than for others, are void at common law, as being against public policy;[4] and it may be enjoined from making such illegal discrimination.[5] In an action against the carrier for discrimination,

it is immaterial that the higher rate charged is not unreasonable.[6] But it has been held that, since a railway company is under no duty to supply greater facilities to express companies than to ordinary shippers, if it contract to furnish special facilities to one express company, it is not thereby bound to extend the same to others.[7] In Illinois, a statute forbidding unjust discrimination has been held not to apply where the shipper has declined to send the goods, upon a demand by the carrier of illegal charges for their transportation.[8]

1 Samuels v. Louisville & N. R. R. Co. 31 Fed. Rep. 57.

2 Scofield v. Lake Shore etc. M. S. R'y Co. 43 Ohio St. 571; 54 Am. Rep. 846.

3 Rothschild v. Wabash R. R. Co. 15 Mo. App. 242.

4 Burlington etc. R'y Co. v. Northwestern Fuel Co. 31 Fed. Rep. 652.

5 De Menacho v. Ward, 23 Blatchf. 502; 27 Fed. Rep. 523; Fargo v. Redfield, 22 Blatchf. 527, where part of the road was located in Canada.

6 Samuels v. Louisville & N. R. R. Co. 31 Fed. Rep. 57.

7 St. Louis etc. R'y Co. v. Southern Express Co. 117 U. S. 1. *Cf.* Baltimore etc. R. R. Co. v. Adams Express Co. 22 Fed. Rep. 404.

8 Kankakee Coal Co. v. Illinois Central R. R. Co. 17 Ill. App. 614.

§ 944. **Pleading, evidence, et cetera.**—In a suit against a railway company as a common carrier, for the loss of goods committed to it for transportation, the best evidence of its having received the goods is the bill of lading,[1] and ordinarily it is liable for the loss only of articles named therein.[2] But the fact that it received the goods may be shown by other evidence, as, for example, by its having offered a reward for their recovery.[3] The defendant's denial of having received the goods is a confession of non-delivery.[4] Ordinarily, to render a common carrier liable for injuries to goods, it is not necessary to prove negligence on its part, for its liability as a common carrier is that of an insurer,

and does not arise from negligence; accordingly, it is only necessary to show that the goods were in good condition and properly packed when committed to the carrier for transportation, and that when delivered to the consignee they were in an injured condition.[5] The burden of proof is then upon the carrier, to show that the injury resulted from one of the excepted causes.[6] To show that goods were in good condition when shipped, evidence of a custom of the carrier to refuse to accept goods unless in good condition is admissible.[7] As evidence that the goods were in an injured condition when delivered to the consignee, it may be shown that the company's agent urged him to take them and do the best he could with them, promising that the company would indemnify him.[8] But statements of the freight agent subsequently to a delivery, are not admissible.[9] A consignee, after accepting from a carrier a large quantity of goods, without suggesting that they might fall short of what there should be, and without counting them over, is estopped from denying that he received all he was entitled to, after having suffered an opportunity to occur when some might have been stolen.[10] If there has been a special contract and stipulation as to rates and risks, the suit must be brought upon the contract, and not upon the carrier's common-law liability as an insurer;[11] so that where a complaint in an action against a railway company alleges in one paragraph a written contract on which property was received for shipment, no recovery will be allowed on a second paragraph which merely sets forth a breach of the company's common-law duty.[12]

1 St. Louis etc. R'y Co. v. Knight, 122 U. S. 79; *Savannah etc. R'y Co. v. Collins*, 77 Ga. 376; 4 Am. St. Rep. 87.

2 *Savannah etc. R'y Co. v. Collins*, 77 Ga. 376; 4 Am. St. Rep. 87.

3 Bennett v. Northern Pacific Express Co. 12 Or. 49.

4 Hot Springs R. R. Co. v. Hudgins, 42 Ark. 435.

5 Koenigsheim v. Hamberg etc. Co. 12 Daly, 123.

6 Higginbotham v. Great Northern R'y Co. 10 Week. R. 358

7 *Knott v. Raleigh etc. R. R. Co.* 98 N. C. 73; 2 Am. St Rep. 321

8 Columbus etc. R'y Co. v. Kennedy, 73 Ga. 646.

9 Boston etc. R. R. Co. v. Ordway, 140 Mass. 510.

10 Five Thousand Two Hundred and Fifty-six Bundles of Staves, 23 Fed. Rep. 106.

11 Snow v. Indiana etc. R'y Co. 109 Ind. 422; White v. Great Western R'y Co. 2 Com. B. N. S. 7; Harris v. Midland R'y Co. 25 Week. R. 63. If the contract was in writing, it must be put in the case and proven: Robison v. Great Western R'y Co. 35 Law J. Com. P. 123.

12 Snow v. Indiana, B. & W. R'y Co. 109 Ind. 422. See further, as to the allegations of the complaint, McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; 1 Am. St. Rep. 721; Carlisle v. Keokuk etc. Co. 82 Mo. 40; *Independence Mills Co. v. Burlington etc. R'y Co.* 72 Iowa, 535; 2 Am. St. Rep. 258.

§ 945. **Who may recover.**—When recovery is sought for the loss, injury or delay of goods committed to the custody of a common carrier, either the absolute owner or any person having a special interest in them may institute the action.[1] Thus, the consignee of goods, to be sold on commission and for which he has accepted a draft, and received a bill of lading, may recover from the carrier for an injury to the goods, even though it was the result of a delay in carriage made at the instance of the consignor.[2] Joint owners of goods shipped in the same package may sue jointly.[3] Nothing being shown to the contrary, the court should assume that the shippers of property, who have charge thereof, and are both consignors and consignees, have sufficient title to enable them to maintain an action against the carrier.[4] Whether the consignor or consignee may bring the suit is to be determined by ascertaining in whom the ownership of the

goods is vested.[5] This depends largely upon the contract of sale. If the consignor in selling the goods contracted to deliver them at the point on the carrier's line where the consignee was to receive them, the former alone can bring the suit; but if the contract was to deliver them to the carrier, the consignee is the proper plaintiff.[6] Where the contract of sale has been executed, and in delivering the goods to the carrier the consignor acts merely as the agent of the consignee, the right of action is in the latter;[7] and it is immaterial in such a case that the former had prepaid the freight charges.[8] But the right of action is in the consignor in the case of goods sent upon approval,[9] where the consignee cannot be found, or where the goods were sent on a fraudulent order,[10] and where the contract of sale is not binding upon the consignee under the statute of frauds.[11] Where goods are shipped under a special contract with the carrier, it is the party to the contract, whether consignor or consignee, who should complain of its breach.[12] But the owner of the goods is not precluded from suing, by the fact that an indemnity bond and a release have been executed to the company by the consignor, such authority not having been conferred upon him by the consignee.[13]

1 Boston & M. R. R. Co. v. Warrior Mower Co. 76 Me. 251; Freeman v. Birch, 3 Q. B. 492, n.

2 Ober v. Indianapolis & St. Louis R. R. Co. 13 Mo. App. 81.

3 Metcalf v. London etc. R'y Co. 4 Com. B. N. S. 317.

4 Swift v. Pacific Mail S. S. Co. 106 N. Y. 206.

5 Pennsylvania Co. v. Poor, 103 Ind. 553, where it was held that a complaint filed by a consignee was bad unless it averred that he was the owner of the goods: Mobile etc. R. R. Co. v. Williams, 54 Ala. 163; Dicey on Parties to Actions, 87: Hoare v. Great Western R'y Co. 25 Week. R. 631. But see Atchison v. Chicago, Rock Island etc. R'y Co. 80 Mo. 213, where it was held that in an action by the consignor against a railway company for negligence in the carriage, it is immaterial whether or not he is the owner of the property.

6 Dunlop v. Lambert. 6 Clark & F. 600; Davis v. James, 5 Burr. 2680; Moore v. Wilson, 1 Term R. 659.

7 Dawes v. Peck, 8 Term R. 330; Cork Distilling Co. v. Great Southern etc. R'y Co. 7 H. L. Cas. 209; Pennsylvania Co. v. Holderman, 1 Am. & Eng. R. R. Cas. (Ind.) 285; Kirkpatrick v. Kansas City etc. R. R. Co. 83 Mo. 341.

8 King v. Meredith, 2 Camp. 639.

9 Swain v. Shepherd, 1 Moody & R. 223; Finn v. Western R. R. Co. 112 Mass. 524.

10 Heuge v. London etc. R'y Co. Law R. 5 Ex. 51.

11 Coates v. Chaplin, 3 Q. B. 483; Coombs v. Bristol etc. R'y Co. 3 Hurl. & N. 510.

12 Redman on Railway Companies, 147.

13 Cream City R. R. Co. v. Chicago, M. etc. R'y Co. 63 Wis. 93.

§ 946. **Measure of damages for refusal to carry.** If a railway company decline to receive goods from a shipper, he may recover against it for the injury sustained by reason of the delay, and for the expense of preserving the goods in the meantime.[1] Evidence of the shipper being compelled to sell the goods at greatly reduced prices is admissible to show the injury resulting from a refusal to carry.[2] Under a statutory provision in Georgia, damages to the amount of ten per centum of the value of the goods is to be presumed in cases of refusal to carry, and as high as twenty-five per centum may be shown.[3] And for the purpose of increasing the damages to the maximum amount of the statutory limit, all elements of damages admissible in other cases may be shown.[4]

1 Houston & Texas Central R'y Co. v. Smith, 63 Tex. 322.

2 Central R. R. Co. v. Logan, 77 Ga. 804.

3 Ga. Code, §§ 719 q and 719 s.

4 Central R. R. Co. v. Logan, 77 Ga. 804.

§ 947. **Measure of damages for delay.**—If the action be brought upon the implied contract to deliver within a reasonable time, the measure of dam-

ages is, *prima facie*, any diminution in the market value of the goods caused by the delay,[1] as well as reasonable expenses incurred in searching and inquiring for the goods.[2] And where a drummer was informed by the carrier's agent that it would take two days to deliver his samples at the place of consignment, he was allowed, after a delay of seven days, to throw them upon the hands of the carrier, and to recover their full value.[3] Nominal damages may be recovered for breach of the contract to deliver promptly, without evidence of actual damage.[4] But vexation and inconvenience suffered on account of the delay are not elements of damage.[5] Where recovery is had against a railway company for a failure to deliver live-stock within the time agreed upon, it is proper for interest to be allowed from the date of the breach of the contract, if the action is *ex contractu*, and from the date of the injury, if it is an action *ex delicto*.[6] But the interest paid by a consignee on a debt, which he intended the property to discharge, does not form part of the damages to be recovered by him in an action against the carrier for a detention.[7]

1 St. Louis etc. R'y Co. v. Phelps, 46 Ark. 485; *Ayres v. Chicago etc. R'y Co.* (1888) 71 Wis. 372; 5 Am. St. Rep. 225; Horn v. Midland R'y Co. Law R. 8 Com. P. 131.

2 *Savannah, Florida etc. R. R. Co. v. Pritchard etc. Co.* 77 Ga. 412; 4 Am. St. Rep. 92; Hales v. London etc. R'y Co. 4 Best & Smith, 66; Gee v. Lancashire & Yorkshire R'y Co. 6 Hurl. & N. 211.

3 Levene v. Great Western R'y Co. 18 Law T. N. S. 295.

4 Robinson v. Great Western R'y Co. Law J. 35 Com P. 123; Roberts v. Midland R'y Co. 25 Week. R. 323.

5 Hamlin v. Great Northern R'y Co. 1 Hurl. & N. 408; Hobbs v. London etc. R'y Co. Law R. 10 Q. B. 111.

6 Illinois Central R. R. Co. v. Haynes, 64 Miss. 604.

7 Houston & Texas Central R'y Co. v. Jackson, 62 Tex. 209.

§ 948. Special damages for loss resulting from y.—Ordinarily, the carrier is not liable for

special damages, unless it has had either actual or constructive notice of the importance of prompt delivery.[1] Thus, a carrier cannot be held liable for loss of profits from the stoppage of a mill caused by its delay in delivering a shaft where it had no notice that prompt delivery was required;[2] nor for wages paid to workmen kept idle by its delay;[3] nor in the absence of notice, can it be held liable for the loss of profits by reason of its failure to deliver a drummer's samples with despatch;[4] nor for the drummer's hotel expenses while awaiting his samples.[5] It is not affected with knowledge of the importance of prompt delivery by the mere fact that they were marked "traveler's goods."[6] If, however, goods were destined for a special purpose at the time when they should have reached their place of consignment, and notice of that fact was brought to the knowledge of the carrier, it is liable for any special loss resulting directly from the delay,[7]— as where it had knowledge of the fact that live-stock were shipped with the intention of selling them on a certain day,[8]— especially when there was an express stipulation that they should be sent at a designated time;[9] as where they were marked, "must be delivered Monday, certain."[10]

1 Pacific Express Co. v. Darnell, 62 Tex. 639; Thomas etc. Manuf. Co. v. Wabash etc. R'y Co. 62 Wis. 642; 51 Am. Rep. 725; Hadley v. Baxendale, 9 Ex. 341; Horn v. Midland R'y Co. Law J. 42 Com. P. 59; Law R. 8 Com. P. 131.

2 Hadley v. Baxendale, 9 Ex. 341.

3 Le Peintur v. Southeastern R'y Co. 2 Law T. N. S. 170.

4 Great Western R'y Co. v. Redmayne, Law R. 1 Com. P. 329.

5 Woodger v. Great Western R'y Co. Law R. 2 Com. P. 318.

6 Candy v. Midland R'y Co. 38 Law T. N. S. 226.

7 Simpson v. London etc. R'y Co. Law R. 1 Q. B. Div. 274.

8 Hamilton v. Western etc. R. R. Co. 96 N. C. 398.

9 Pickford v. Grand Junction R'y Co. 12 Mees. & W. 766.

10 Simpson v. London etc. R'y Co. Law R. 1 Q. B. Div. 274.

§ 949. Measure of damages for loss or destruction of goods.—The measure of damages in an action against a common carrier for the loss or entire destruction of goods, is their market value at the place of consignment,[1] at the time when they should have arrived,[2] or if they have no market value at the place of consignment, then the cost price or actual value may be recovered.[3] Special damages, also, may be recovered for the loss of things committed to a carrier for transportation. So that not only the actual value of the thing, but also profits which the consignee failed to make by being deprived of its use, are elements of damage.[4] But the loss of a chance to win a prize at an exhibition by the carrier's failure to deliver a model, is too remote a possibility to be considered in estimating damages; and in such a case, the measure is the value of the labor expended and materials used in making the model.[5] So, the measure of damages, in an action against a carrier for the loss of a package containing architect's plans, was held to be the sum which it would reasonably cost to obtain new plans; but, in the absence of notice to the carrier of what the package contained, no consideration was taken of the injury resulting from the consequent delay in building the house.[6] When goods are stated to have a certain value, that amount is the maximum limit of recovery;[7] unless the shipper was induced by false statements in the bill of lading to place a lower value on the goods.[8]

1 Rice v. Baxendale, 7 Hurl. & N. 96.

2 Brandt v. Bawlby, 2 Barn. & Ald. 932.

3 British Columbia Saw Mills v. Nettleship, Law R. 3 Com. P. 499; O'Hanlan v. Great Western R'y Co. 6 Best & Smith, 484. *Cf.* Leonard v. Fitchburg R. R. Co. 143 Mass. 307.

4 *Savannah, Florida etc. R. R. Co. v. Pritchard etc. Co.* 77 Ga. 412; 4 Am. St. Rep. 92.

5 Lythgoe v. East Anglia R'y Co. 15 Jur. 400.

6 Mather v. American Express Co. 133 Mass. 55; 52 Am. Rep. 253.

7 McCanee v. London etc. R'y Co. 3 Hurl. & C. 343. *Cf. Savannah etc. R'y Co. v. Collins*, 49 N. J. 167.

8 McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; 1 Am. St. Rep. 721.

§ 950. **Measure of damages for injury to goods.** When the injury does not amount to a total destruction, the measure of damages is the difference between the market value of the goods at the place of consignment at the proper time of arrival, and what they would sell for after the injury, in their damaged condition.[1] And where, after preparation for market, goods which, upon original survey, were thought to be greatly damaged, are found to be salable at a higher price than was expected, and for nearly what they would have brought in perfect condition, the first appraisal of damages is to be disregarded.[2] But where property is so damaged by the negligence of a carrier that the cost of repairs would equal the value of the property before it was damaged, the measure of recovery is its value, the amount paid for freight, and interest from the time when delivery was due.[3]

1 Magdeburg etc. Ins. Co. v. Paulson, 20 Fed. Rep. 530; The Mangalore, 9 Sawy. 71; Heil v. St. Louis etc. R'y Co. 16 Mo. App. 363; Collard v. Southeastern R'y Co. 7 Hurl. & N. 79.

2 Magdeburg etc. Ins. Co. v. Paulson, 29 Fed. Rep. 530.

3 Thomas etc. Manuf. Co. v. Wabash etc. R'y Co. 62 Wis. 642; 51 Am. Rep. 725.

§ 951. **Bills of Lading.**—A bill of lading is defined to be a written acknowledgment by a common carrier of the receipt of certain goods described therein, and an agreement to transport them to their place of destination, to be there delivered in

good order to the consignee or his assigns.[1] Of the three copies usually made, the one retained by the consignor controls in case of any variation in their terms.[2] The terms of a bill of lading, issued at the time the goods were shipped, and being the original contract between the parties, are not to be varied by parol;[3] as, for example, to show that another place was agreed upon for the delivery of the goods than that set forth in the bill.[4] And, in the absence of fraud, the consignor accepting a bill of lading cannot plead ignorance of its terms.[5] But if the original contract was a verbal agreement, and the bill of lading was issued subsequently thereto, the former is not merged in the latter, and its terms may be proven by parol.[6] As in the case of other written contracts, parol evidence is admissible to explain an ambiguity;[7] and it may be shown that its recitals, in respect of reduced rates, were false in fact.[8] A bill of lading possesses several of the qualities of negotiable paper.[9] Thus, the carrier cannot plead, as against a *bona-fide* holder for value, that a bill of lading, issued by its authorized agent, was for goods never received.[10] And, if the carrier deliver the goods to a person not presenting and surrendering the bill of lading, it does so at its peril, being answerable in trover to the *bona-fide* purchaser of the bill.[11] Where a railway company delivers property to the consignee, without demanding a production of the bill of lading, and it subsequently appears that it was attached to a draft drawn on the consignee for the price of the goods, which was dishonored, and the bill of lading returned, the company will be held liable thereon for the value of the property.[12]

Again, a shipper, by attaching to his bill of lading a draft upon the consignee, will be held thereby to declare his purpose to deliver the property upon payment of such draft, and if the company, under such circumstances, hands the property over to the shipper while in course of transportation, it will become liable to the consignee who has duly taken up the draft.[13] In New York carriers are prohibited by statute from delivering goods for which a bill of lading has been issued, unless the bill be surrendered and canceled, or has on its face the words "not negotiable"[14] If the copies are transferred to different parties, the carrier should deliver the goods to the one first presenting the bill and demanding delivery.[15]

1 Tiedeman on Commercial Paper (1889), § 491, citing Redfield on Carriers, § 247; Knox v. The Nivella, Crabbe, 534; S. C. 1 Smith's Lead. Cas. 879; Haille v. Smith, 1 Bos. & P. 564; Howard v. Shepherd, 19 Law J. Com. B. 248; Sanders v. Vanzeller, 12 Law J. Ex. 497.

2 The Thames, 14 Wall. 98.

3 Germania Fire Ins. Co. v. Memphis etc. R. R. Co. 72 N. Y. 90; Belger v. Dinsmore, 51 N. Y. 166; Gage v. Morse, 12 Allen, 410; Hewett v. Chicago etc. R'y Co. 63 Iowa, 611.

4 Riley v. New York etc. R. R. Co. 34 Hun, 97; Hewett v. Chicago etc. R'y Co. 63 Iowa, 611.

5 Merchants' Dispatch Transp. Co. v. Bloch, 86 Tenn. 392; 6 Am. St. Rep. 847; McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; 1 Am. St. Rep. 721.

6 *Vide infra*, 963.

7 Savannah etc. R. R. Co. v. Collins, 77 Ga. 376; 4 Am. St. Rep. 87.

8 McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; 1 Am. St. Rep. 721.

9 National Bank v. Merchants' National Bank, 91 U. S. 92; Barnard v. Campbell, 55 N. Y. 462; Blanchard v. Page, 3 Gray, 297; Bell v. Moss, 5 Whart. 189; Davenport National Bank v. Homeyer, 45 Mo. 145; Gurney v. Behrend, 3 El. & B. 622; Berkley v. Watling, 7 Ad. & E. 22; Lickbarrow v. Mason, 2 Term. Rep. 63; Tiedeman on Commercial Paper (1889), § 491.

10 Bank of Batavia v. New York etc. R. R. Co. 106 N. Y. 195, affirming S. C. 33 Hun, 589; Brooke v. New York etc. R. R. Co. 108 Pa. St. 529; note, 53 Am. Rep. 235. *Contra*, Black v. Wilmington etc. R. R. Co. 92 N. C. 42; 53 Am. Rep. 450. *Cf.* St. Louis etc. Co. v. Knight, 122 U. S. 79, where the goods were known to be of inferior quality to that specified in the bill, and the company was held not liable. *Cf.* St. Louis etc. Co. v. Knight, 122 U. S. 79, where, although the agent of the carrier knew that the bill of lading falsely specified a higher grade of goods than was consigned, the carrier was not held liable.

11 Colgate v. Pennsylvania Co. 102 N. Y. 120.

12 Furman v. Union Pacific R'y Co. 106 N. Y. 579; Merchants' Dispatch & Transp. Co. v. Merriam, 111 Ind. 5.

13 Wells, Fargo & Co. v. Oregon R'y & Nav. Co. 32 Fed. Rep. 51.

14 N. Y. Laws of 1856, ch. 326; and N. Y. Laws of 1859, ch. 353.

15 Stevens v. Boston etc. R. R. Co. 8 Gray, 262; 1 Smith's Lead. Cas. 891; Lamb v. Durant, 12 Mass. 54.

CHAPTER XXXVII.

LIMITATIONS UPON THE CARRIER'S LIABILITY.

§ 952. Stipulations against liability.
§ 953. Stipulations against liability for negligence.
§ 954. The same subject, continued—The New York rule.
§ 955. Connecting carriers.
§ 956. Contributory negligence on the part of the carrier.
§ 957. Of the consideration—Carriers of things.
§ 958. Of the consideration—Carriers of persons—Public policy.
§ 959. Construction of contracts restricting liability.
§ 960. Restrictions upon liability by public notice.
§ 961. Restrictions upon liability by notice in tickets, checks and receipts.
§ 962. Restrictions upon liability by stipulation in bills of lading.
§ 963. Verbal contracts of shipment not merged in bills of lading.
§ 964. Restrictions as to amount of damages.
§ 965. Stipulations as to the manner of presenting claims for damages.
§ 966. Limitations as to the time of presenting claim and bringing suit.
§ 967. Pleading—Evidence—Burden of proof.

§ 952. Stipulations against general liability. The general liabilities of common carriers, both of persons or things, may be restricted or diminished to a reasonable degree by special contract, or by stipulations, to which the passenger or shipper has, either expressly or by implication, assented.[1] "At common law, if property was lost or injured while in the hands of the carrier, the burden of proof was on the carrier to show the existence of such circumstances as were sufficient to excuse him from liability. Such is still the general rule, but when a special contract is entered into between the ship-

per and the carrier, the contract takes the place of the common-law rule, and fixes the liability of the carrier."[2] The contract, however, must be clear and specific.[3] To bind the other contracting party, the terms imposed by the carrier must be agreed to understandingly;[4] they must be in themselves reasonable,[5] and such as are ordinarily contained in tickets or bills of lading.[6] While the law is in most of the States as stated above, in Texas there is a statutory provision[7] declaring invalid any contract by which a carrier is relieved of all liability for loss or damage, except that resulting from the willful negligence of its servants.[8] But this is held not to prohibit a company from reserving to itself in a bill of lading the benefit of any insurance which the owner may have on the freight.[9]

1 Express Co. v. Kountz, 8 Wall. 341; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344; Farmers' etc. Bank v. Champlain Transp. Co. 23 Vt. 186; Baltimore etc. R. R. Co. v. Skeels, 3 W. Va. 553; *Wallace v. Matthews*, 39 Ga. 617; 99 Am. Dec. 473; Southern Express Co. v. Purcell, 37 Ga. 103; Michigan etc. R. R. Co. v. Heaton, 31 Ind. 397, n; Lamb v. Camden etc. R. R. Co. 2 Daly, 454; Indianapolis etc. R. R. Co. v. Allen, 31 Ind. 394; McFadden v. Missouri Pacific R'y Co. (1887) 92 Mo. 343; 1 Am. St. Rep. 721; Merchants' Despatch Transp. Co. v. Bloch Bros. (1887) 83 Tenn. 392; 6 Am. St. Rep. 847; "Limiting Liability of Express Companies," 29 Cent. Law J. 108. *Contra*, Gulf, Colorado & S. F. R'y Co. v. Trawick (1887), 68 Tex. 314; 2 Am. St. Rep. 494.

2 *Pennsylvania R. R. Co. v. Raiordon*, 119 Pa. St. 577; 4 Am. St. Rep. 670. *Acc.* Hart v. Pennsylvania R. R. Co. 112 U. S. 331, 338; Express Co. v. Caldwell, 21 Wall. 267; Cooper v. Berry, 21 Ga. 526; 68 Am. Dec. 468; Thayer v. St. Louis R. R. Co. 22 Ind. 26; 85 Am. Dec. 409, and n. 418; Georgia R. R. Co. v. Gann, 68 Ga. 350; Dorr v. New Jersey Steam Nav. Co. 11 N. Y. 485, 492; Western Transportation Co. v. Newhall, 24 Ill. 466; 76 Am. Dec. 760, and n. 775; Graham v. Davis, 4 Ohio St. 362; 62 Am. Dec. 285, and n. 294; Roberts v. Riley, 15 La. An. 103; 77 Am. Dec. 83; Southern Express Co. v. Purcell, 37 Ga. 103; 92 Am. Dec. 53, and n. 56; Grace v. Adams, 100 Mass. 505; 97 Am. Dec. 117; Mobile etc. R. R. Co. v. Hopkins, 41 Ala. 486; 91 Am. Dec. 607; Evansville etc. R. R. Co. v. Young, 28 Ind. 516; McMillan v. Michigan Southern R. R. Co. 16 Mich. 69; Blumenthal v. Brainerd, 38 Vt. 402; 91 Am. Dec. 349, and n. 363; Parson v. Monteath, 13 Barb. 553; Well v. New York Cent. R. R. Co. 24 N. Y. 181; Southern Express Co. v. Newby, 36 Ga. 635; 91 Am. Dec. 783; Atwood v. Reliance etc. Co. 9 Watts, 87; Bingham v. Rogers, 6 Watts & S. 495; Central R. R. Co. v. Bryant, 73 Ga. 722; Indianapolis etc. R. R. Co. v. Cox, 29 Ind. 306; 95 Am. Dec. 640; McFadden v. Missouri Pacific R. R. Co. 92 Mo. 343; 1 Am. St. Rep. 721.

3 Smith v. New York etc. R. R. Co. 29 Barb. 122.

4 *McFadden v Missouri Pacific R. R. Co.* 92 Mass. 343; 1 Am. St. Rep. 741.

5 *Railroad Co. v. Lockwood* (1873), 17 Wall. 357; S. C. Thompson on Carriers, 378.

6 Tarbell v. Royal Exchange Shipping Co. (1888) 110 N. Y. 170; 6 Am. St. Rep. 350.

7 Tex. Rev. Stat. art. 278.

8 Gulf, Colorado & S. F. R'y Co. v. Trawick, 68 Tex. 314.

9 British & Foreign Mar. Ins. Co. v. Gulf, Colorado etc. R'y Co. 63 Tex. 475; 51 Am. Rep. 661.

§ 953. Stipulations against liability for negligence.—While the rigor of the common law has been relaxed, so as to allow reasonable limitations upon the carrier's liability to be imposed by contract, this concession to changed conditions of business cannot be extended so far as to permit the carrier to exempt itself from liability for its own negligence, or that of its servants, resulting in injuries either to persons or things.[1] Public policy forbids that a common carrier should be allowed to contract for exemption from liability for damage occasioned by his negligence, willful default or tort.[2] Thus, a railway company cannot escape liability for an injury resulting from a defective car, by inserting in the contract of shipment a provision that the shipper accepts the car provided by the company.[3]

1 Inman v. South Carolina R'y Co. 129 U. S. 128; Hart v. Pennsylvania R. R. Co. 112 U. S. 331, 333; Bank of Kentucky v. Adams Express Co. 93 U. S. 174; *Railroad Co. v. Lockwood* (1873), 17 Wall. 357; S. C. Thompson on Carriers, 378; McFadden v. Missouri Pacific R'y Co. (1887) 92 Mo. 343; 1 Am. St. Rep. 721; Pennsylvania R. R. Co. v. Raiordon (1888), 119 Pa. St. 577; 4 Am. St. Rep. 670; Merchants' Dispatch Transp. Co. v. Bloch Bros. (1887) 86 Tenn. 392; 6 Am. St. Rep. 847; East Tennessee etc. R. R. Co. v. Johnston, 75 Ala. 596; 51 Am. St. Rep. 489; Southern Express Co. v. Purcell, 37 Ga. 103; 92 Am. Dec. 53; Squire v. New York Central R. R. Co. 98 Mass. 239; 93 Am. Dec. 162, and n. 167; Grace v. Adams, 100 Mass. 505; 97 Am. Dec. 117; Chicago etc. R. R. Co. v. Abels, 60 Miss. 1017; Little Rock etc. R. R. Co v. Talbot, 39 Ark. 525; Rose v Des Moines etc. R. R. Co. 39 Iowa, 246; Ohio etc. R. R. Co. v. Selby, 47 Ind. 471; Michigan etc. R. R. Co. v. Heaton, 37 Ind. 448; Grogan v. Adams Express Co. 114 Pa. St. 523; Goldey v. Pennsylvania R. R. Co. 30 Pa. St. 242; Empire etc. Co. v Wamsutta etc. Co. 63 Pa. St. 14; Beach on Contributory Negligence, § 53.

2 Mobile etc. R. R. Co. v. Hopkins, 41 Ala. 486; 94 Am. Dec. 607; Pennsylvania R. R. Co. v. Raiordon, 119 Pa. St. 577; 4 Am. St. Rep. 670; Pennsylvania R. R. Co. v. Miller, 87 Pa. St. 395; Baltimore etc. R. R. Co. v. Skeels, 3 W. Va. 556; Carroll v. Missouri Pacific R'y Co. 88 Mo. 239; Louisville etc R. R. Co. v. Oden, 80 Ala. 38; Gulf of Colorado etc. R R. Co. v. McGown, 65 Tex. 640; Evansville etc. R. R. Co. v. Young, 28 Ind. 515; Blumenthal v. Brainerd, 38 Vt. 402; 91 Am. Dec. 349, and n. 363; Levering v. Union etc. Co. 42 Mo. 88; 97 Am. Dec 320, and n. 325; Indianapolis etc. R. R. Co. v. Cox, 29 Ind. 360; 95 Am. Dec. 640; Ortt v. Minneapolis etc. R'y Co. 63 Minn. 396; Grogan v. Adams Express Co. 114 Pa. St. 523; M Fadden v. Missouri Pa ific R'y Co. 92 Mo. 343, 348; 1 Am. St. Rep. 721; Illinois etc. R. R. Co. v. Adams, 42 Ill. 474; 92 Am. Dec. 85; Seller v. Pacific Co. 1 Oregon, 409; Pennsylvania R. R. Co. v. McClosky, 23 Pa. St. 526; Branch v. Wilmington etc. R. R. Co. 88 N. C. 573; Southern Express Co. v. Moon, 39 Miss. 822; Farnham v. Camden etc. R. R. Co 55 Pa. St. 53; Georgia R. R. Co. v. Gann, 68 Ga. 350; Chicago etc. R. R. Co. v. Moss, 60 Miss. 1003; Roberts v. Riley, 15 La. An. 103; 77 Am. Dec. 83; Graham v. Davis, 4 Ohio St. 362; 62 Am. Dec. 285, and n. 294.

3 Wallingford v. Columbia & G. R. R. Co. 2 S. C. 19.

§ 954. **The same subject, continued—The New York rule.**— In some of the New York cases it is held, that the carrier may, by a contract expressed in unequivocal terms, even exonerate himself from liability for gross negligence.[1] Thus, a railroad company, under a contract relieving it from liability for the negligence of its employees or for the insecurity of its cars, cannot be held liable for shipping property in a car, adapted to the purposes for which it was made, but unsafe for the shipment of the property in question.[2] But to avoid liability for negligence, the carrier must show clearly a stipulation to that effect.[3] And even in New York a railroad company cannot contract for exemption from liability to a passenger for damage resulting from its own willful misconduct, or that degree of recklessness which is its equivalent.[4]

1 Maynard v. Syracuse etc. R. R. Co. 71 N. Y. 180; 27 Am. Rep. 28; Cragin v. New York etc. R. R. Co. 51 N. Y. 61; 10 Am. Rep. 559; Poucher v. New York etc. R. R. Co. 49 N. Y. 263; 10 Am. Rep. 364; Bissell v. New York etc. R R. Co. 25 N. Y. 442; Mangin v. Dinsmore, 56 N. Y. 168; Westcott v. Fargo, 61 N. Y. 542; Spinatti v. Atlas S. S. Co. 81 N. Y. 71. *Cf.* Farmers etc. Bank v. Champlain Trans. Co. 23 Vt. 136; Hart v. Pennsylvania R. R. Co. 112 U. S. 331; Beach on Contributory Negligence, § 59.

2 Wilson v. New York Central etc. R. R. Co. 97 N. Y. 87.

3 Ghormley v. Dinsmore, 51 N. Y. Super. Ct. 196.

4 Perkins v. New York Central R. R. Co. 24 N. Y. 196; 82 Am. Dec. 282, and n. 290.

§ 955. **Connecting carriers.**—A connecting carrier, by receiving freight from another carrier, under a contract between the consignor and the latter, becomes the agent of the other carrier to complete his contract to the extent of shipping it over so much of his route as forms a part of the route over which the shipment was to be made, and is liable for any loss resulting from his failure to perform the contract, but he is also entitled to the benefit of all valid limitations of the carrier's liability contained in the contract.[1] Where property is shipped over several connecting lines, any one of them may limit its liability therefor to the period during which it has the property under its own control.[2] But a railway company has no power to limit, by its bills of lading, a liability for the negligence of connecting lines, imposed upon it by statute.[3]

1 St. Louis, I. M. etc. R'y Co. v. Weakly (1887), 50 Ark. 397; S. C. 7 Am. St. Rep. 104; Kiff v. Atchison etc. R. R. Co. 23 Kan. 263.

2 Weinburg v. Albemarle etc. R. R. Co. 91 N. C. 31.

3 Heil v. St. Louis etc. R'y Co. 16 Mo. App. 363.

§ 956. **Contributory negligence on the part of the carrier.**—General contracts against liability do not include injuries or loss resulting from the carrier's negligence;[1] as, for example, in allowing its stations to remain in a defective and dangerous condition;[2] nor cases where injury has resulted from stowing goods in unsuitable cars,[3] or where goods were, through willful negligence, misdelivered.[4] So, if a carrier is accustomed to seal valu-

able packages, a failure to do so will sustain an action for negligence, even though it may have imposed general restrictions on its liability.[5] And even special stipulations against liability for injury from certain specified causes do not exonerate the carrier, if the injury would not have occurred but for its contributory negligence.[6] Thus, under a contract relieving it of liability for the suffocation of live-stock during transportation, a railway company may still be held if the suffocation resulted from its needless delay.[7] And the same principle is applied to cases of leakage and breakage, where the carrier has contributed thereto by its negligence.[8] It should take reasonable precautions to guard against the restiveness of cattle, if it would avoid liability for resulting injuries, though that be one of the causes stipulated against in the contract of shipment.[9] The carrier is liable, also, for negligence in putting a car-load of mules and straw next to the engine, even though the bill of lading expressly waived "loss by fire."[10] And the burden is said to be upon the carrier, notwithstanding an exception exempting it from liability for loss by fire, to show that the accident did not occur through any fault or negligence on its part, or on the part of its agents or employees.[11]

1 Rooth v. North Eastern R'y Co. Law R. 2 Ex. 173.

2 Rooth v. North Eastern R'y Co. Law R. 2 Ex. 173.

3 Lewis v. Great Western R'y Co. 3 Q. B. Div. 45.

4 Hoare v. Great Western R'y Co. 25 Week. R. 631.

5 Overland Mail & Express Co. v. Carroll, 7 Colo. 43.

6 Ball v. Wabash etc. R'y Co. 83 Mo. 574; Levering v. Union Transp. etc. Co. 42 Mo. 88; 97 Am. Dec. 320, annotated.

7 Ball v. Wabash etc. R'y Co. 83 Mo. 574.

8 Phillips v. Clark, 2 Com. B. N. S. 156.

9 Gill v. Manchester etc. R'y Co. Law R. 8 Q. B. 186.

10 McFadden v. Missouri Pacific R'y Co. (1887), 92 Mo. 343; 1 Am St.

Rep. 721. But see Bassett v. Connecticut River R. R. Co. 145 Mass. 129; 1 Am. St. Rep. 443.

11 Levering v. Union Transp. etc. Co. 42 Mo. 88; 97 Am. Dec. 320, and n. 322. But *vide infra*, § 967.

§ 957. Of the consideration—Carriers of things. A reduction in charges is a valid consideration to support a contract limiting the carrier's liability in respect of injuries to things.[1] Thus, it has been held that a limitation in a contract fairly entered into between a railroad company and a shipper of live stock over its road, restricting the company's liability in any case to the sum of fifty dollars for each animal lost, is, if based upon a reduction of the charge made for the transportation of the stock, reasonable, and will be enforced as the measure of the company's liability, although the animal lost is shown to have been worth from six to eight hundred dollars.[2] And a railway company was held not liable for an injury to live-stock, which it carried at reduced rates in consideration of the owner assuming all risks of transportation, where the loss appeared to have arisen from the stock being kept over-night in the cars after reaching its destination, without any default or negligence on the part of the company.[3] But whether or not a stipulation in a contract of shipment, by which the liability of a common carrier is limited to a fixed sum for each head of stock to be transported, shall limit the shipper to such sum, if the loss occurs through the carrier's negligence, depends on whether or not the shipper has received adequate compensation for the concession, and in the absence of bad faith on his part, he will not be bound if the stipulation was obtained through a false representation that he was to be allowed special rates in consequence.[4] Evi-

dence is admissible, as between the parties, to show the falsity of a representation contained in a bill of lading to the effect that the property of the shipper is being transmitted at a reduced rate, which forms a consideration for a limit to the carrier's liability for loss.[5] The defendant's failure to object to the admission of such evidence at the time it was introduced precludes it from subsequently objecting thereto.[6] It has been said that the carrier is not liable for failure to deliver goods which he has agreed to carry gratuitously.[7] But if the agreement be silent as to compensation, it will not be held to be a contract for gratuitous carriage; and since reasonable charges may be recovered for the services properly rendered, liability attaches for any neglect of duty with respect to the goods.[8]

1 Hill v. Boston etc. R. R. Co. 144 Mass. 234; St. Louis etc. R'y Co. v. Lesser, 46 Ark. 236; Brown v. Wabash etc. R'y Co. 18 Mo. Ap. 53; Gilbormley v. Dinsmore, 53 N. Y. Super Ct. 36; Beach on Contributory Negligence, §§ 8, 53.

2 St. Louis etc. R'y Co. v. Weakly (1887), 50 Ark. 397; S. C. 7 Am. St. Rep. 104.

3 Meyers v. Wabash, St. L. etc. R'y Co. 90 Mo. 98.

4 McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; 1 Am. St. Rep. 721.

5 McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; 1 Am. St. Rep. 721.

6 McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; 1 Am. St. Rep. 721.

7 Chouteau v. Steamboat St. Anthony, 16 Mo. 216; Wheeler's "Modern Law of Carriers," 112.

8 Kirtland v. Montgomery, 1 Swan, 452; Wheeler's "Modern Law of Carriers," 112.

§ 958. Of the consideration—Carriers of persons—Public policy.—In New York, gratuitous passage is held to support a stipulation against liability for injuries to persons,[1] occurring through the *ordinary negligence* of any of the company's servants and agents, other than its managing officers or directors, the latter being considered as

identical with the corporation itself.[2] And this would seem to be the rule in New Jersey, also.[3] But in the other States, such contracts against liability for injuries to persons are generally held to be contrary to public policy, and void.[4] Even in New York, upon grounds of public policy, the carrier is held liable for gross or culpable negligence, notwithstanding the contract.[5]

1 Poucher v. New York etc. R. R. Co. 49 N. Y. 263; 10 Am. Rep. 364, annotated; Wells v. New York etc. R. R. Co. 24 N. Y. 181; Perkins v. New York etc. R. R. Co. 24 N. Y. 196; 82 Am. Dec. 232, annotated. *Cf.* Griswold v. New York etc. R. R. Co. 53 Conn. 371; 55 Am. Rep. 115; Beach on Contributory Negligence, §§ 8, 59.

2 Perkins v. New York etc. R. R. Co. 24 N. Y. 196; 82 Am. Dec. 282, annotated; Boswell v. Hudson River R. R. Co. 5 Bosw. 699; Poucher v. New York Central R. R. Co. 49 N. Y. 263. *Cf.* Illinois Central R. R. Co. v. Reed, 37 Ill. 484; Indiana Central R. R. Co. v. Munday, 21 Ind. 48; Illinois Central R. R. Co. v. Reed, 37 Ill. 484; Gallin v. Railway Co. Law R. 10 Q. B. 212.

3 Camden etc. R. R. Co. v. Bausch, (Pa. 1887), the cause of action having arisen in New Jersey; Kinney v. Central R. R. Co. 32 N. J. 407.

4 Pennsylvania R. R. Co. v. McCloskey, 23 Pa. St. 532; Illinois etc. R. R. Co. v. Read, 37 Ill. 484; Carroll v. Missouri R'y Co. 83 Mo. 239; 57 Am. Rep. 382, annotated, where a drover had signed a release from liability for injuries occurring through any cause whatever; Mobile etc. R. R. Co. v. Hopkins, 41 Ala. 486; 91 Am. Dec. 607; Cleveland etc. R. R. Co. v. Curran, 19 Ohio St. 1; Pennsylvania R. R. Co. v. Henderson, 51 Pa. St. 315; Flinn v. Wilmington etc. R. R. Co. 1 Houst. 469; Prince v. International etc. R. R. Co. 64 Tex. 144; Jacobus v. St. Paul etc. R. R. Co. 20 Minn. 125; Indiana etc. R. R. Co. v. Mendy, 21 Ind. 48; Gulf of Colorado etc. R. R. Co. v. McGown, 65 Tex. 640. But see Annas v. Milwaukee etc. R. R. Co. 67 Wis. 46; 57 Am. Rep. and note; Kinney v. Central R. R. Co. 34 N. J. 513.

5 Nolton v. Western R. R. Co. 15 N. Y. 444; 69 Am. Dec. 623.

§ 959. Construction of contracts restricting liability.—The construction of contracts restricting the liabilities of carriers is for the court, and in so doing it should take into consideration all of the circumstances of each case, and the course of dealing between the parties.[1] The findings of facts, however, upon which the court's construction is based, are to be made by the jury.[2] As a general rule, such contracts will be construed more strongly against the carrier, it being the maker thereof and

the dictator of its terms.[3] Thus, stipulations against certain specified causes of injury do not excuse the carrier from liability with respect to others; and "owner's risk" does not include *delay*.[4] Delay is not covered even by a contract against liability for all injuries not resulting from willful negligence.[5] So, also, the word "carriages" will not be extended to shield a carrier from liability for street-cars transported by it;[6] nor will "packages" be construed to cover corn in bulk.[7] And a stipulation against liability for injury, "by fire or on any account whatever," does not cover injuries caused by the carrier's negligence.[8]

1 Lewis v. Great Western R'y Co. Law R. 3 Q. B. Div. 45; Peek v. North Staffordshire R'y Co. 10 H. L. Cas. 473.

2 Neilson v. Harford, 8 Mees. & W. 823; Lewis v. Great Western R'y Co. Law R. 3 Q. B. Div. 45; Wood's Railway Law, 1604.

3 McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; 1 Am. St. Rep. 721; Missouri Pacific R'y Co. 16 Mo. App. 225; Cream City R. R. Co v. Chicago etc. R'y Co. 63 Wis. 93; 53 Am. Rep. 267; Missouri Pacific R'y Co. v. Harris, 67 Tex. 166; Mitchell v. Lancashire and Yorkshire R'y Co. Law R. 10 Q. B. 256.

4 Robinson v. Great Western R'y Co 35 Law J. Com. P. 127; D'Arc v. London etc. R'y Co. Law R. 9 Com. P. 325.

5 Missouri Pacific R'y Co. v. Harris, 67 Tex. 166.

6 Cream City R. R. Co. v. Chicago etc. R'y Co. 63 Wis. 93; 53 Am. Rep. 267.

7 Rosenstein v. Missouri Pacific R'y Co. 16 Mo. App. 225.

8 McFadden v. Missouri Pacific R'y Co. 92 Mo. 343; 1 Am. St. Rep. 721.

§ 960. Restrictions upon liability by public notice.—A contract limiting the liability of a common carrier is not to be presumed, from the mere fact of its having given public notice that it would carry only upon certain terms and conditions. It must also appear that the passenger or shipper had actual knowledge of the limitation and that he acquiesced therein.[1] "In every case of public notice, the burden of proof is on the carrier to show that

the person with whom he deals is fully informed of its tenor and extent; . . . and in an action against a carrier, the defendant must satisfy the jury that the notice was actually communicated to the plaintiff. If it was posted up or advertised in a newspaper, it must appear that he read it. In the latter case, the advertisement affords no ground for an inference of notice, unless it be proved that the plaintiff was in the habit of taking or reading the newspapers in which it was inserted, and even then the jury are not bound to find the fact."[2] And printed notices, receipts and regulations, even when brought to shipper's notice, and assented to by him, will not excuse the carrier from liability for a failure to use ordinary care.[3]

1 South etc. R. R. Co. v. Henlein, 56 Ala. 368; Clark v. Faxon, 21 Wend. (N. Y.) 153; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U. S.) 344; York Co. v. Central R. R. Co. 3 Wall. (U. S.) 107; Wallace v. Mathews, 30 Ga. 617; Express Co. v. Kountze, 8 Wall. (U. S. 341); Simon v. The Fung Shuey, 21 La. An. 363; Lamb v. Camden etc. R. R. Co. 2 Daly (N. Y.), 454; Indianapolis etc. R. R Co. v. Allen, 31 Ind. 394; Farmers etc. Bank v. Champlain Transportation Co. 23 Vt. 186; Fillebrown v. Grand Trunk R. R. Co. 55 Me. 462; Southern Exp. Co. v. Crook, 44 Ala. 468; Sager v. Portsmouth etc. R. R. Co. 31 Me. 228; Gott v. Dinsmore, 111 Mass. 52; Hollister v. Nowlen, 19 Wend. (N. Y.) 254; Cole v. Goodwin, 19 Wend. (N. Y.) 251; Michigan etc. R. R. Co. v. Heaton, 31 Ind. 397, n; Baltimore etc. R. R. Co. v. Skeels, 3 W. Va. 556; New Orleans etc. Ins. Co. v. New Orleans etc. R. R. Co. 20 La. An. 302; Dewart v. Loamer, 21 Conn. 245; Kimball v. Rutland etc. R. R. Co. 26 Vt. 247; Judson v. Western R. R. Co. 6 Allen (Mass.), 486; Michigan etc. R. R. Co. 6 Mich. 243; Moses v. Boston etc. R. R. Co. 32 N. H. 523; Dorr v. New Jersey Steam Nav. Co. 11 N. Y. 485; Smith v. North Carolina R. R. Co. 64 N. C. 235; Georgia R. R. Co. v. Gann, 68 Ga. 350; Alabama etc. R. R. Co. v. Little, 2 Abb. Law J. 141; State v. Townsend, 37 Ala. 247.

2 2 Greenleaf on Evidence (13th ed.), § 216.

3 Mann v. Birchard, 40 Vt. 326; 94 Am. Dec. 398, and n. 402; Adams' Exp. Co. v. Steltaners, 61 Ill. 184; 14 Am. Rep. 57; Mobile etc. R. R. Co. v. Hopkins, 41 Ala. 486; 94 Am. Dec. 607.

§ 961. Restrictions upon liability by notice in tickets, checks and receipts.—Stipulations in tickets and checks given by a carrier of passengers[1], or in receipts given by the carrier to consignors of

goods,[2] raise a presumption that the other party knew of the limitation and assented thereto; and the burden of proving want of knowledge is upon the plaintiff. To raise this presumption, it is not necessary that his attention should have been directed to the condition.[3] As a general rule, however, the passenger is bound only by such conditions and stipulations as are printed on the face of his ticket; but if there be words upon the face thereof referring to conditions printed on the back, he will be affected with knowledge of their terms.[4] The mere acceptance, however, of a receipt is not conclusive with respect to the question of knowledge and assent. The presumption arising from acceptance may be rebutted.[5]

1 Cresson v. Philadelphia etc. R. R. Co. 11 Phila. 597.

2 Logan v. Pontchartrain R. R. Co. 11 Rob. 24; 43 Am. Dec. 199; Bank of Kentucky v. Adams Express Co. 93 U. S. 171; Squires v. New York Central R. R. Co. 98 Mass. 239; Hoadley v. Northern Trans. Co. 115 Mass. 304; Pemberton Co. v. New York Central R. R. Co. 104 Mass. 114; Grace v. Adams, 100 Mass 505; Gott v. Dinsmore, 111 Mass. 45.

3 Bethea v. Northeastern R. R. Co. (1887) 28 S. C. 91. *Contra*, Western Trans. Co. v. Newhall, 24 Ill. 466. *Cf.* Baltimore etc. R. R. Co. v. Campbell, 35 Ohio St. 647; 38 Am. Rep. 617. But see Beach on Contributory Negligence, § 60.

4 Cresson v. Philadelphia etc. R. R. Co. 11 Phila. 597. *Cf.* Brown v. Eastern R. R. Co. 11 Cush. 97. *Contra*, in case of a check which had on its face the words, "Look on the back": Malone v. Boston etc. R. R. Co. 12 Gray, 338; 74 Am. Dec. 598.

5 Madan v. Sherrard, 73 N. Y. 329; Woodruff v. Sherrard, 16 N. Y. Supr. Ct. 322; Adams Express Co. v. Haynes, 42 Ill. 89; United States Express Co. v. Haynes, 67 Ill. 137; Anchor Line v. Dator, 68 Ill. 363; Adams Express Co. v. Stettauers, 61 Ill. 184; Field v. Chicago etc. R. R. Co. 71 Ill. 458; Merchants' Despatch Co. v. Theilbar, 86 Ill. 71; Adams Express Co. v. King, 3 Ill. App. 316; Morrison v. Phillips etc. Construction Co. 44 Wis. 405; Brown v. Adams Express Co. 15 W. Va. 812; Michigan etc. R. R. Co. v. Boyd, 91 Ill. 263; American Express Co. v. Spellman, 90 Ill. 455; Merchants' Despatch Co. v. Leyser 80 Ill. 43; Merchants' Despatch Co. v. Jaesting, 89 Ill. 152; Wood's Railway Law, 1577.

§ 962. Restrictions upon liability by stipulations in bills of lading.—But while evidence of want of knowledge may be introduced in the case of receipts and tickets,[1] it is inadmissible with

respect to a bill of lading, the latter being in itself the contract between the consignor and the carrier.[2] And the shipper is bound by a contract limiting the carrier's liability, even though he did not read it, nor hear it read, before signing it, provided the carrier resorted to no unfair means, and practiced no fraud or imposition in procuring the signature, and the shipper had the opportunity to know its contents.[3] But unreasonable and unusual stipulations are not binding upon the consignor, even when contained in a bill of lading.[4]

1 That a ticket is a mere voucher or receipt, and does not embody the contract between the passenger and carrier, *vide supra*, § 863.

2 Evansville etc. R. R. Co v. Androscoggin Mills, 22 Wall. (U. S.) 594; Farnham v Railroad Co. 55 Pa. St. 53; King v. Woodbridge, 34 Vt. 565; Steers v. Steamship Co. 57 N. Y. 1; Huntington v. Dinsmore, 4 Hun (N Y.), 66; Snider v. Adams' Express Co. 63 Mo. 376; Kallman v. Express Co. 3 Kan. 205; Kirkland v. Dinsmore, 62 N. Y. 171; Robinson v. Merchants' Despatch Co. 45 Iowa, 470; Swindler v. Hilliard, 2 Rich. (S. C.) 286; McMillan v. Railroad Co. 16 Mich. 112; Boorman v. American Express Co. 21 Wis 154; Steele v. Townsend, 37 Ala. 247. *Contra*, Western Transit Co. v. Hosking, 19 Ill. App. 607; Lake Shore etc. R'y Co. v. Davis, 1 Ill. App. 425, where, however, it was held that knowledge and assent might be shown for similar transactions between the parties.

3 St. Louis, I. M. etc. R'y Co. v. Weakly (1887), 50 Ark. 397; S. C. 7 Am St. Rep. 104.

4 Tarbell v. Royal Exchange Shipping Co. (1838) 110 N. Y. 170; 6 Am. St. Rep. 350. *Cf.* Ghormley v. Dinsmore, 53 N. Y. Super. Ct. 35, as to the presumption of knowledge and assent arising from use of the customary blanks.

§ 963. Verbal contracts of shipment not merged in bills of lading.—To render stipulations against liability contained in a bill of lading binding upon the consignor, it must be issued and accepted at the time of shipment.[1] And a parol contract of shipment made prior to the issue of a bill of lading is not merged in the latter.[2] Thus, a railway company cannot limit its liability by a stipulation in a bill of lading, not delivered immediately upon the receipt of the goods, but forwarded by

mail to the point of destination.[3] So, where a contract of shipment was made with two connecting lines, notice being given them of the danger of loss from delay in the transportation of the property, and they declared that there should be no delay, that they were prepared to take the proper care of the goods, and would be responsible for loss from the cause apprehended; and, upon subsequently receiving the property for shipment, the common agent of the companies issued bills of lading, limiting their liability for the loss provided against in the former contract, and, by reason of delay in transportation, such loss occurred, it was held to be a proper finding by the jury that the actual contract was contained in the prior agreement, and not in the bills of lading.[4] In another case, a railway company made a parol agreement to supply cars on a certain day, in order that a shipper might have his live-stock at their destination by a particular market-day; but the cars were not furnished, the shipment was delayed, and when made, a bill of lading was given, limiting the company's liability as to detention, and measure of damages, in consideration of reduced rates; whereupon it was held that the parol agreement was not merged in the bill of lading, and that damages for the delay should be awarded the shipper.[5]

1 Louisville & N. R. R. Co. v. Meyer, 78 Ala. 597; Swift v. Pacific Mail S. S. Co. 106 N. Y. 206; Hamilton v. Western N. C. R. R. Co. 96 N. C. 398.

2 Hamilton v. Western etc. R. R. Co. 96 N. C. 398.

3 Louisville & N. R. R. Co. v. Meyer, 78 Ala. 597.

4 Swift v. Pacific Mail S. S. Co. 106 N. Y. 206.

5 Hamilton v. Western N. C. R. R. Co. 96 N. C. 398.

§ 964. Restrictions as to amount of damages. A valid contract may be entered into between a

railway company and a shipper, making the basis of damages the value of the property at the time and place of shipment.[1] So it is considered a reasonable stipulation in a bill of lading that the carrier shall be liable for no more than the invoice or declared value of goods, whichever may prove the least.[2] And the shipper is bound by a contract that the valuation of the goods agreed to in the bill of lading shall limit his recovery in case they are lost.[3] For example, a limitation of liability to a certain sum, unless a greater valuation be expressed and extra charges paid thereon, is binding upon the shipper.[4] In case of partial injury damages will be assessed *pro tanto*.[5]

1 Chicago etc. R. R. Co. v. Harmon, 17 Ill. App. 640.

2 The Lydian Monarch, 23 Fed. Rep. 298; Pearse v. Quebec S. S. Co. 24 Fed. Rep. 285.

3 Hart v. Pennsylvania R. R. Co. 112 U. S. 331; Graves v. Lake Shore & Michigan Southern R'y Co. 137 Mass. 33; 50 Am. Rep. 282; Wheeler's "Modern Law of Carriers," 116. *Contra*, Adams Express Co. v. Holmes, 19 Week N. Cas. 571.

4 The Bermuda, 29 Fed. Rep. 399, under U. S. Rev. Stat. § 4281.

5 St. Louis etc. R'y Co. v. Lesser, 46 Ark. 236.

§ 965. Stipulations as to the manner of presenting claims for damages.—The carrier may stipulate as to the manner of presenting claims, and may require them to be in writing,[1] verified by affidavit, before they shall be allowed or sued for.[2] But, under the statutes of Texas,[3] a contract, requiring the shipper to give a written notice of his claim at a certain place and within a certain time, as a condition precedent to his right of recovery, is invalid.[4] It is held, however, in that State, that a provision in a contract of shipment, limiting the time within which a shipper may sue for any claim for damage arising under the contract, to less than

that prescribed by the statute of limitations, does not limit or restrict the company's liability so as to fall within this statutory prohibition, and will be enforced, if reasonable.[5] And, whether it is reasonable for a railway company accepting live-stock for transportation beyond its line, to stipulate in the contract of shipment, that, as a condition precedent to his right of recovery for any loss or injury, the shipper shall give notice of his claim to some officer of the company, or to its nearest station agent, before the stock is removed, depends upon whether the company has an officer or agent to whom notice can be given near the place of delivery.[6] The carrier's right, under the contract, to claim notice before suit of the amount of the damage to property, may be waived.[7] Thus, its conduct upon the making of an oral demand may operate as a waiver of its right to require the claim to be presented in writing according to contract.[8]

1 Chicago etc. R. R. Co. v. Simms, 18 Ill. App. 63; Wheeler's "Modern Law of Carriers," 1-4 *et seq.*

2 Brown v. Wabash etc. R'y Co. 18 Mo. App. 568.

3 Tex. Rev. Stat. art. 278.

4 Gulf, Colorado & S. F. R'y Co. v. Frawick, 68 Tex. 314.

5 Gulf, Colorado & S. F. R'y Co. v. Frawick, 63 Tex. 314.

6 Missouri Pacific R'y Co. v. Harris, 67 Tex. 166.

7 International & Great Northern R'y Co. v. Underwood, 62 Tex. 21.

8 Bennett v. Northern Pacific Express Co. 12 Oregon, 49.

§ 966. **Limitations as to the time of presenting claim and bringing suit.**—A common carrier may, by special contract, impose a reasonable limitation upon the time within which claims for damages shall be presented,[1] the reasonableness of the limitation as to time depending upon the circumstances of each particular case.[2] It may stipulate with a

shipper of live-stock that he must make any claim he may have for damages before his cattle become mixed with others.[3] So, also, it is held that a common carrier may impose a shorter limitation for the institution of legal proceedings than is prescribed by the statute of the State.[4] Thus, a limitation of sixty days wherein to bring suit, has been considered reasonable, and the plaintiff's right of recovery held to be barred, notwithstanding the fact that forty-eight days of that time had elapsed whilst he was making efforts to adjust his claim without litigation.[5] But the time, stipulated in a contract with a carrier, within which written claims for losses must be tendered, does not run while efforts are being made by the carrier to discover the lost property.[6]

1 Express Co. v. Caldwell, 21 Wall. 264; Chicago etc. R. R. Co. v. Simms, 18 Ill. App. 68, where the limitation was five days; Southern Express Co. v. Glenn, 16 Lea, 472; Thompson v. Chicago etc. R. R. Co. 22 Mo. App. 321; Hirshberg v. Dinsmore, 12 Daly, 429; Southern Express Co. v. Hunnicutt, 54 Miss. 566; Wheeler's "Modern Law of Carriers," 123.

2 Ninety days held to be reasonable, in Express Co. v. Caldwell, 21 Wall. 264. The same limit held unreasonable, in Porter v. Southern Express Co. 4 S. C. 135. A limit of thirty days held reasonable, in Hirshberg v. Dinsmore, 12 Daly, 429; and unreasonable, in Southern Express Co. v. Caperton, 44 Ala. 101. See Wheeler's "Modern Law of Carriers," 123, and cases there cited in detail.

3 Sprague v. Missouri Pacific R'y Co. 34 Kan. 347.

4 Thompson v. Chicago etc. R. R. Co. 22 Mo. App. 321; Gulf etc. R'y Co. v. Trawick, 63 Tex. 314; 2 Am. St. Rep. 434, where a limitation of forty days was sustained as reasonable.

5 Thompson v. Chicago etc. R. R. Co. 22 Mo. App. 321.

6 Ghormley v. Dinsmore, 51 N. Y. Super. Ct. 196.

§ 967. Pleading—Evidence—Burden of Proof. Contracts exonerating the carrier from liability, if relied upon by way of defense, must be specially pleaded.[1] The existence of such a contract is to be determined ordinarily by the jury.[2] But an allegation by plaintiff that he had complied with a cer-

tain condition printed upon his ticket estops him from denying that it constituted a part of his contract.[3] The effect of a contract restricting the carrier's liability, save for the negligence[4] or willful misconduct of its servants, is to shift the burden of proving negligence or willful misconduct upon the plaintiff.[5]

1 Citizens' Street R'y Co. v. Twiname, 111 Ind. 587.

2 Wallingford v. Columbia etc. R. R. Co. 25 S. C. 258.

3 Rawitzky v. Louisville & N. R. Co. (1838) 40 La. An. 47.

4 Heil v. St. Louis etc. R'y Co. 16 Mo. App. 363; Little Rock etc. R'y Co. v. Harper, 44 Ark. 208; Harris v. Midland R'y Co. 25 Week. R. 63. *Contra*, Levering v. Union Transp. etc. Co. 42 Mo. 88: 97 Am. Dec. 330, annotated.

5 Lewis v. Great Western R'y Co. 3 Q. B. Div. 45; Great Western R'y Co. v. Gleinster, 22 Week. R. 72; Webb v. Great Western R'y Co. 26 Week. R. 111; Haynes v. Great Western R'y Co. 41 Law T. N. S. 436. As to what fa·ts are sufficient and insufficient to show willful negligence, see Lewis v. Great Western R'y Co. 3 Q. B. Div. 45; Hoare v. Great Western R'y Co. 25 Week. R. 631; Great Western R'y Co. v. Glei·ster, 22 Week. R. 72; Webb v. Great Western R'y Co. 26 Week. R. 111; Haynes v. Great Western R'y Co. 41 Law T. N. S. 436

CHAPTER XXXVIII.

INJURIES TO PERSONS AND PROPERTY.

§ 968. Injuries to property by fire.
§ 969. Injuries to cattle.
§ 970. Injuries to strangers.
§ 971. Injuries to servants.
§ 972. Injuries to passengers—The carrier not an absolute insurer.
§ 973. Free passengers.
§ 974. Age, sex and physical condition.
§ 975. Unprecedented accidents.
§ 976. Presumption of negligence.
§ 977. Contributory negligence.
§ 978. Intersecting roads—*Thorogood v. Bryan*, denied.
§ 979. Intoxication as contributory negligence.
§ 980. Injuries from protruding one's arm from a car window.
§ 981. Dangerous premises and approaches.
§ 982. Injuries from the carrier's failure to provide lights at its stations and platforms.
§ 983. Injuries to passengers crossing tracks at railway stations.
§ 984. Imperfect appliances for boarding and alighting.
§ 985. The same subject, continued.
§ 986. Boarding and alighting at irregular places.
§ 987. Boarding and alighting from trains in motion—*(a)*. Contributory negligence.
§ 988. *(b)*. Contributory negligence not presumed from the act itself.
§ 989. *(c)*. Sundry examples.
§ 990. Premature starting of trains.
§ 991. Sudden jerking of cars and trains—*(a)*. The carrier's negligence.
§ 992. *(b)*. Contributory negligence of passenger—Leaving seat.
§ 993. Riding on platforms and other irregular places—*(a)*. Contributory negligence.
§ 994. *(b)*. Not contributory negligence, there being no seat or room in the car.
§ 995. *(c)*. Not contributory negligence when in the passenger's line of duty, or when acting under the direction of the company's servant.
§ 996. Defective appliances for transportation.

§ 997. The same subject, continued—The passenger's knowledge of the defect.
§ 998. Injuries arising from directions of the carrier's employees.
§ 999. The same subject, continued.
§ 1000. Warnings of danger.
§ 1001. The carrier's liability for assaults and insults—*(a)*. In general
§ 1002. *(b)*. By servants of the carrier—Scope of employment.
§ 1003. *(c)*. The carrier's peculiar obligation to female passengers.
§ 1004. *(d)*. The conductor's duty and authority in the premises.
§ 1005. *(e)*. Exemplary damages for failure to protect.
§ 1006. Connecting carriers—Through tickets.
§ 1007. Sleeping and parlor cars.
§ 1008. Effect of consolidation, lease and running privileges.
§ 1009. Measure of damages.
§ 1010. Injuries resulting in death.

968. Injuries to property by fire.—A railway company is liable in damages for negligently setting fire to property along its route.[1] And an allegation in a complaint that premises were set on fire by sparks from a locomotive is upheld by proof that it was communicated from other premises so ignited.[2] While the emission of sparks from its locomotives does not in itself constitute negligence,[3] yet proof that fire was communicated from a locomotive establishes a *prima facie* case of negligence, and throws the burden of proof upon the company.[4] To rebut the presumption, it may adduce evidence of the competency and careful habits of its engineer and fireman, and of the fact that its engine was of a new and approved make, furnished with a proper spark-arrester, and had undergone a due inspection.[5] Or it may set up the contributory negligence of the property owner; as, for example, in leaving cotton unprotected from sparks on the railway platform.[6] But it is no defense to an action for fire negligently caused by a railway com-

pany, that the person complaining permitted the natural growth of grass and stubble to remain on his premises.[7] And in a case where varnish and benzine, placed out-of-doors at a varnish factory, became ignited from a locomotive which the railway company had negligently failed to provide with a proper spark-arrester, the manufacturer was held free from contributory negligence.[8] In Indiana, when a person sues a railway company for injury to his property by fire, it is not enough for him to allege that he was free from fault, but he must aver an absence on his part of contributory negligence.[9] A railway company is not necessarily guilty of negligence in permitting grass and weeds to accumulate on its right of way.[10] And it is insufficient to show negligence on the part of a railway company that it permitted inflammable material to gather on the right of way, in a suit against it for loss by fire alleged to have been induced by the negligent running of its locomotive.[11] But it has been held a sufficient averment of negligence to allege that the company negligently permitted dry trash to gather along the road, that it did not use a spark-arrester, and that the netting on the smoke-stack of the engine was defective so as to permit an escape of sparks of fire, which were carried into the trash, and into the adjoining fields of the plaintiff, and by which the same became ignited.[12] The plaintiff may show that other fires were started by the locomotive complained of during the same trip,[13] and that it was then taken to the company's shop for repairs.[14] If an engine get out of repair at a point where there are no means of putting it in good condition again, the company

mu t stop it at the next station, and may not run it with increased danger to the next repair-shops.[15]

1 Minn. Gen. Stat. (1878) ch. 34, § 60; Conn. Session Laws of 1881, ch. 92, and cases cited *infra*.

2 Butcher v. Vaca Valley & C. L. R. R. Co. 67 Cal. 518; Chicago etc. R. R. Co. v. Pennell, 110 Ill. 435; Simmonds v. New York etc. R. R. Co. 33 Conn. 264; 52 Am. Rep. 587.

3 Texas etc. R'y Co. v. Medaris, 64 Tex. 92.

4 Huff v. Missouri Pacific R'y Co. 17 Mo. App. 356; Crews v. Kansas City etc. R. R. Co. 10 Mo. App. 302; Wise v. Joplin R. R. Co. 85 Mo. 178; Nickern v. Chicago etc. R'y Co. 22 Fed. Rep. 811. *Cf.* Mobile etc. R. R. Co. v. Gray, 52 Miss. 333.

5 Patton v. St. Louis & S. F. R'y Co. 87 Mo. 117. But see Huff v. Missouri Pacific R'y Co. 17 Mo. App. 356.

6 Texas etc. R'y Co. v. Tankersley, 63 Tex. 57. *Cf.* Beach on Contributory Negligence, §§ 62, 63.

7 Patton v. St. Louis & S. F. R'y Co. 87 Mo. 117; 56 Am. Rep. 446.

8 Kalbfleisch v. Long Island R. R. Co. 102 N. Y. 520; 55 Am. Rep. 832.

9 Wabash etc. R'y Co. v. Johnson, 96 Ind. 40, 44, 62.

10 Texas & Pacific R'y Co. v. Medairs, 64 Tex. 92. But see Clarke v. Chicago etc. R'y Co. 33 Minn. 359.

11 Carter v. Kansas City etc. R'y Co. 65 Iowa, 287.

12 Louisville, N. A. & C. R'y Co. v. Parks, 97 Ind. 307.

13 Patton v. St. Louis & S. F. R'y Co. 87 Mo. 117; Butcher v. Vaca Valley etc. R. R. Co. 67 Cal. 518; Green Ridge R. R. Co. v. Brinkman, 64 Md. 52; 54 Am. Rep. 755.

14 Butcher v. Vaca Valley etc. R. R. Co. 67 Cal. 518.

15 Texas & Pacific R'y Co. v. Tankersley, 63 Tex. 57.

§ 969. Injuries to cattle.—The liability of railway companies for injuries to cattle straying upon their tracks is largely dependent upon statutory regulation.[1] In most of the States, railways are required by statute to sound signals of warning at crossings, and upon the appearance of any obstacle upon the track; and if cattle were injured through the defendant's failure to do so, a *prima facie* case of negligence is made out,[2] and the burden of proof is upon it to show due care on its part, or contributory negligence on the part of the owner of the cattle.[3] It is immaterial that the animals, in all probability, would not have heeded the warnings.[4]

The question of negligence and contributory negligence in actions for the killing of live-stock turns, also, largely upon the fence laws of the State, whether they require the owners of cattle to fence them *in*, or whether it is the duty of the railway company to fence them *out*. No recovery can be had if the owner has permitted them to run at large contrary to law. He is chargeable with contributory negligence,[5] except where he can show that they escaped notwithstanding his fulfillment of his obligation to maintain lawful fences.[6] On the other hand, where the duty of fencing its right of way is imposed by statute upon the railroad, its failure to do so and the fact of the injury being shown, a presumption of negligence on its part arises,[7] which may be rebutted, however, by showing that it was under no obligation to maintain fences at the place where the cattle began to stray upon the track,[8] or that a defect in the fence was of recent occurrence, and a reasonable time for repairing it had not elapsed.[9]

1 See Md. Code, art. 77, § 1; Ga. Code, §§ 1444-1454; Miss. Act of March 13, 1884; Miss. Code (1880), § 1059; Mo. Rev. Stat. (1879) § 809, 2124; Kans. Comp. Laws (1879), ch. 84, art. 2; Kans. Comp. Laws (1879), pp. 784, 785, §§ 4915-19; Ind. Rev. Stat. (1881) § 4025 *et seq.*; Iowa Code (1873), § 1288 *et seq.*; Wis. Rev. Stat. § 1810; Ill. Acts of 1874, § 1 *et seq.*; Neb. Comp. Stat. (1885) ch. 72; Ala. Code, § 1711.

2 Missouri Pacific R'y Co. v. Stevens, 35 Kan. 622; Cincinnati etc. R'y Co. v. Hiltzbauer, 99 Ind. 486; Persinger v. Wabash etc. R'y Co. 82 Mo. 196. *Cf.* Hafferty v. Wabash etc. R'y Co. 82 Mo. 90; Cathcart v. Hannibal etc. R'y Co. 19 Mo. App. 113.

3 Milburn v. Kansas City etc. R. R. Co. 86 Mo. 104, where the owner saw the danger, and might have saved his cattle, but relied upon the signals of warning. He was held guilty of contributory negligence. See Beach on Contributory Negligence, §§ 224, 236, 240, 242.

4 Kendrick v. Chicago etc. R. R. Co. 81 Mo. 521.

5 Vanhorn v. Burlington etc. R'y Co. 63 Iowa, 67; Lyons v. Terre Haute etc. R. R. Co. 101 Ind. 419; Carey v. Chicago etc. R'y Co. 61 Wis. 71. See Beach on Contributory Negligence, §§ 237, 238.

6 Moriarty v. Central Iowa R'y Co. 64 Iowa, 696; Missouri Pacific R'y Co. v. Johnson, 35 Kan. 58.

7 International etc. R. R. Co. v. Cocke, 64 Tex. 151; Lee v. Minneapolis etc. R'y Co. 66 Iowa, 131; Alsop v. Ohio etc. R'y Co. 19 Ill. App. 292; Busby v. St. Louis etc. R'y Co. 81 Mo. 43; Moore v. Wabash etc. R'y Co. 81 Mo. 499; Nicholson v. Hannibal etc. R. R. Co, 82 Mo. 73; Wilson v. St Louis etc. R'y Co. 87 Mo. 431; Boggs v. Missouri Pacific R'y Co. 18 Mo. App. 274. But see Vinyard v. St. Louis etc. R'y Co. 80 Mo. 92. See Beach on Contributory Negligence §§ 236, 237, 221, 212.

8 Cincinnati etc. R'y Co. v. Hiltzhauer, 99 Ind. 486; Wabash etc. R'y Co. v. Nice, 99 Ind. 152; Croy v. Louisville N. A. & C. R'y Co. 97 Ind. 126; Morrow v. Missouri Pacific R'y Co. 82 Mo. 169; Robinson v. St. Louis etc. R'y Co. 21 Mo. App. 141.

9 Young v. Hannibal etc. R. R. Co. 62 Mo. 427; Hearton v. Wabash etc. R'y Co. 18 Mo. App. 403; Busby v. St. Louis R'y Co. 81 Mo. 43; Crosby v. Detroit etc. R'y Co. 53 Mich. 458.

§ 970. **Injuries to strangers.**—There is a difference between the liabilities of a railway company for injuries to passengers and for injuries to strangers. Its obligation to protect and to carry the former safely is founded not only upon public policy, but also upon the contract of carriage; whereas its obligation with respect to strangers is based upon public policy alone. The passenger may elect to sue for damages *ex contractu* or *ex delicto;* but a stranger may recover only in tort.[1] An action may be maintained against a railway company by a person for injuries sustained by him from a defective platform at a station to which he had gone to see a friend depart.[2] And where a government mail clerk is injured through the negligence of a railway company, he may maintain an action against it for damages.[3] The railway's employees must use reasonable efforts to prevent injury to persons seen crossing or walking upon the track,[4] whether they be using the track under the company's license or acquiescence,[5] or whether they be trespassers.[6] For even a trespasser may recover for injuries from a wrongful act of the company, if he was duly careful and prudent in ing upon the roadway.[7] Notice of the approach

of a train should be given at points of apprehended danger;[8] but failure to ring the bell or blow the whistle at a private crossing guarded by a gate, where no station or side-track exists, and trains do not stop, is not evidence of negligence.[9] Walking on the track is not of itself contributory negligence, barring recovery, due from the negligence of the employee of the railway.[10] Ordinary care, however, requires a traveler to stop when he knows a train to be due, though its approach could not be seen.[11] A person walking upon the track in the streets of a city, is not a trespasser,[12] and it is not his duty to exercise the same care that would be exacted of him in using the track of the railway in the open country;[13] greater care is required in running trains out of time, at unusual hours,[14] and through populous towns.[15] While the rights of travelers and of the company upon highway crossings are equal,[16] the right of the company is superior to his in respect to priority of passage;[17] and it is not bound to stop a train or slacken its speed for a person crossing or about to cross the track at a highway.[18] His right upon the track, even in city streets, is subordinate to that of the railroad company.[19] To entitle him to recovery for personal injuries at a railway crossing, the plaintiff must have used reasonable care.[20] Damages for injury by the negligence of a railroad are restricted to actual damages.[21]

1 Brand v. Schenectady etc. R. R. Co. 8 Barb. 368; Way v. Chicago etc. R'y Co. (1888) 73 Iowa, 163; Creed v. Pennsylvania R. R. Co 86 Pa. St. 139; Secord v. St. Paul etc. R. R. Co. 18 Fed. Rep. 221; Lucas v Milwaukee etc. R. R. Co. 33 Wis. 41; Milton v. Middlesex R. R. Co. 107 Mass. 108; Gradin v. St. Paul & Duluth R. R. Co. 30 Minn. 217; Jacobus v. St. Paul & C. R. R. Co. 20 Minn. 125; *McCall v. Forsyth*, 4 Watts & S. 179 Thompson on Carriers, 540.

2 Hamilton v. Texas & Pacific R'y Co. 64 Tex. 251; 53 Am. Rep. 756.

3 Houston & T. C. R'y Co. v. Hampton, 66 Tex. 487.

4 *Louisville, N. A. and C. R'y Co. v. Phillips* (1887), 112 Ind. 59; 2 Am. St. Rep. 155.

5 Troy v. Cape Fear etc. R. R. Co. (1888), 99 N. C. 298; 6 Am. St. Rep. 521.

6 Troy v. Cape Fear etc. R. R. Co. (1888), 99 N. C. 298; 6 Am. St. Rep. 521; Beach on Contributory Negligence, §§ 78, 79, 80; 1 Am. & E. Encyc. of Law, 3 8.

7 Troy v. Cape Fear etc. R. R. Co. (1888) 99 N. C. 298; 6 Am. St. Rep. 521. But see *Louisville, N. A. and C. etc. R'y Co. v. Phillips*, 2 Am. St. Rep. 155.

8 Chicago & Alton R. R. Co. v. Dillon (1883), 103 Ill. 347; 42 Am. St. Rep. 559.

9 Philadelphia W. & B. R. R. Co. v. Fronk (1887), 67 Md. 30; 1 Am. St. Rep. 390

10 Troy v. Cape Fear etc. R. R. Co. (1888) 99 N. C. 298; 6 Am. St. Rep. 521.

11 Seefield v. Chicago, M. & St. P. R. R. Co. (1887), 70 Wis. 251; 5 Am. St. Rep. 168.

12 *Louisville, N. A. and C. R'y Co. v. Phillips* (1887), 112 Ind. 59; 2 Am. St. Rep. 155.

13 Moebus v. Herrman (1888), 108 N. Y. 349; 2 Am. St. Rep. 441.

14 Troy v. Cape Fear etc. R. R. Co. (1888) 99 N. C. 298; 6 Am. St. Rep. 521.

15 Troy v. Cape Fear etc. R. R. Co. (1888) 99 N. C. 298; 6 Am. St. Rep. 521.

16 Ohio & Mississippi R'y Co. v. Walker (1887), 113 Ind. 196; 3 Am. St. Rep. 638.

17 Ohio & Mississippi R'y Co. v. Walker (1887), 113 Ind. 196; 3 Am. St. Rep. 638.

18 Ohio & Mississippi R'y Co. v. Walker (1887), 113 Ind. 196; 3 Am. St. Rep. 638.

19 *Louisville, N. A. and C. R'y Co. v. Phillips* (1887), 112 Ind. 59; 2 Am. St. Rep. 155.

20 Wichita & Western R. R. Co. v. Davis (1887), 37 Kans. 743; 1 Am. St. Rep. 275; *Louisville, N. A. and C. R'y Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155.

21 Troy v. Cape Fear etc. R. R. Co. (1888) 99 N. C. 298; 6 Am. St. Rep. 521.

§ 971. Injuries to servants.—One who enters upon the service of another takes on *himself* all the ordinary risks of the employment in *which* he engages.[1] And, while the relation of master and servant requires each to exercise ordinary and reasonable care,[2] yet to entitle a servant to recover for injury, he must prove negligence or omission of

...y on the part of the master, causing the injury.[3] ... employer is not responsible to a servant for an ...ury received in his employment resulting from ...ngers which can be readily seen by common ob... ...rvation.[4] But he must notify the servant of any ...ecial risks incident to his employment of which ...e latter is not cognizant, or which are not appar...nt.[5] An employee of a railroad company is not ...ound to know all the defects of the road.[6] The master must supply his servant with safe instrumentalities for the prosecution of his labor.[7] Thus, it is the duty of a railroad company to provide reasonably safe cars, tracks, bridges, *et cetera*, for the discharge of the duties of its employees.[8] And the servant has a right to assume that his master has done his duty in respect to furnishing safe instrumentalities, and to rely on his superior judgment.[9] But an employee who continues in service with notice of a defect augmenting his danger assumes the risk as increased thereby.[10]

1 Fisk v. Central Pacific R. R. Co. (1887) 72 Cal. 38; 1 Am. St. Rep. 22; Lewis v. Leifert (1887), 116 Pa. St. 628; 2 Am. St. Rep. 631; Woodward v. Shumpp (1888), 120 Pa. St. 45; 6 Am. St. Rep. 716; St. Louis etc. R. R. Co. v. Irwin, 37 Kan. 701; 1 Am. St. Rep. 266.

2 Wormell v. Maine Central R. R. Co. (1887) 79 Me. 397; 1 Am. St. Rep. 321.

3 Wormell v. Maine Central R. R. Co. (1887) 79 Me. 397; 1 Am. St. Rep. 321; Cole v. Chicago etc. R'y Co. 71 Wis. 114; 5 Am. St. Rep. 201; Indianapolis etc. R'y Co. v. Watson, 114 Ind. 20; 5 Am. St. Rep. 578.

4 Smith v. Peninsular Car Works (1883), 60 Mich. 501; 1 Am. St. Rep. 542; Little Rock, M. R. & T. R'y Co. v. Leverett (1886), 48 Ark. 333; 3 Am. St. Rep. 230.

5 Smith v. Peninsular Car Works (1886), 60 Mich. 501; 1 Am. St. Rep. 542; Beach on Contributory Negligence, §§ 351, 362.

6 St. Louis, Ft. Scott & W. R. R. Co. v. Irwin (1887), 37 Kan. 701; 1 Am. St. Rep. 266.

7 Wuotilla v. Duluth Lumber Co. 37 Minn. 153; 5 Am. St. Rep. 832.

8 St. Louis, Ft. Scott & W. R. R. Co. v. Irwin (1887), 37 Kan. 701; 1 Am. St. Rep. 266; Clapp v. Minneapolis etc. R. R. Co. 36 Minn. 6; 1 Am. St. Rep. 629.

9 Wuotilla v. Duluth Lumber Co (1887), 37 Minn. 153; 5 Am. St. Rep. 832.

10 Indianapolis and St. Louis R'y Co. v. Watson (1887), 115 Ind. 20; 5 Am. St. Rep. 578; Beach on Contributory Negligence, §§ 371-373.

§ 972. **Injuries to passengers—The carrier not an absolute insurer.**—Carriers must at no time expose their passengers to extraordinary dangers, readily discoverable by reasonable diligence.[1] The carrier is held to the same liability for the acts of the officers and servants in charge of its cars as they themselves would be were they the owners thereof.[2] To each mode of conveyance, be it steam cars, street-cars, or vehicles drawn by horses, must be applied the greatest degree of skill, care and foresight of which it is susceptible.[3] But there is a wide distinction between the liabilities of carriers of persons and carriers of things. The latter are liable as insurers, while the former are liable only for negligence.[4] Public policy, however, holds a railway company, as a carrier of persons, to the highest degree of care consistent with the practical operation of its road;[5] and if it omit any reasonable and practicable precaution tending to promote the safety of its passengers, it will be deemed guilty of negligence, and held liable in damages to a passenger injured thereby.[6] "When carriers undertake to convey persons by the powerful, but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'"[7] No accident can be said to have been inevitable, if it were such as

might have been averted by the use of known and proper precautions against the danger.[8] But the carrier cannot be required to exercise the same degree of care as an ordinarily careful man would use toward himself, his family and property.[9] And unless the defendant's negligence was the proximate cause of injury, the plaintiff is not entitled to damages.[10] Thus, where the defendant failed to stop its train and a passenger jumped from it, alighting on the platform in safety, but colliding with a fellow-passenger, fell under the train and was killed, it cannot be said that the defendant's negligence was the proximate cause of his death.[11]

1 Chicago & Alton R. R. Co. v. Pillsbury (1887), 123 Ill. 9; 5 Am. St. Rep. 483.

2 Louisville & N. R. R. Co. v. Ballard (1883), 85 Ky. 307; 7 Am. St. Rep. 600.

3 Topeka City R. R. Co. v. Higgs (1888), 38 Kan. 375; 5 Am St. Rep. 754; Chicago & Alton R. R. Co. v. Pillsbury (1887), 123 Ill. 9; 5 Am. St. Rep. 483. *Cf.* Potts v. Chicago City R'y Co. 33 Fed. Rep. 610; International etc. R. R. Co. v. Cock, 68 Tex. 713, as to the degree of care required in operating a hand-car.

4 Ladd v. Foster, 31 Fed. Rep. 827; Chicago etc. R. R. Co. v. Pillsbury, 123 Ill. 9; 6 Am. St. Rep. 483; *Croft v. Waterhouse*, 11 Moore, 138; Christie v. Griggs, 2 Camp, 79; Caldwell v. New Jersey Steamboat Co. 47 N. Y. 282; Aston v. Heaven, 2 Esp. 533; Bennett v. Peninsula Steamboat Co. 6 Com. B 775; Sharp v. Grey, 9 Bing. 460; Pendleton etc. R. R. Co. v. Snires, 13 Ohio St. 235; Feital v. Middlesex R. R. Co. 109 Mass. 398; Knight v. Portland etc. R. R. Co. 56 Me. 234; Munroe v. Leach, 7 Met. 274; Mier v. Pennsylvania R. R. Co. 64 Pa. St. 225.

5 Dougherty v. Missouri R. R. Co. (1838), 97 Mo. 647; Topeka City R'y Co. v. Higgs (1888), 38 Kan. 375; Persling v. Chicago etc. R. R. Co. 71 Iowa, 551; Ladd v. Foster, 31 Fed. Rep. 827; Citizens' St. R'y Co. v. Twiname, 111 Ind. 537; Decker v. Manhattan R'y Co. 49 Hun, 607; *Hegeman v. Western R. R. Co.* 13 N. Y. 9; S. C. Thompson on Carriers, 160.

6 Anderson v. Scholey (1888), 114 Ind. 553; New York C. & St. L. R'y Co. v. Doane (1888), 115 Ind. 435; 7 Am. St. Rep. 451.

7 *Philadelphia R. R. Co. v. Derby*, 14 How. 468. *Acc.* Pennsylvania R. R. Co. v. Henderson, 51 Pa. St. 316; Railroad Co. v. Stevens, 95 U. S. 655.

8 Ladd v. Foster, 31 Fed. Rep. 827. But see Moreland v. Boston etc. R. R. Co. 141 Mass. 31.

9 Louisville & N. R. R. Co. v. McCoy, 81 Ky. 403.

10 Reibel v. Cincinnati etc. R'y Co. 114 Ind. 476.

11 Reibel v. Cincinnati etc. R'y Co. 114 Ind. 476.

§ 973. **Free passengers.**—In the absence of a contract limiting its liability, the carrier is answerable for negligence resulting in the injury of a passenger carried gratuitously, to the same extent that it would be had he paid for his transportation.[1] From his reception as a passenger by its servants, arises an obligation on the carrier's part to convey him safely. And this is true, even though its servants in so doing violate the rules of the company, provided there be no collusion between them and the passenger to defraud the company.[2] Thus, a railway company carrying children under three years of age, free of charge, is liable for injuries caused by its negligence to a child over that age taken by its mother without intent to defraud, and allowed to ride without question by the conductor.[3] If, however, a person knows that the carrier's servant has no authority to permit him to ride gratuitously, he cannot recover damages.[4] In all cases where the company is required by law to carry a person free, he is entitled to all the rights and privileges of a passenger.[5] Whether a servant of the company carried free to and from his work is to be considered a passenger with respect to his right of recovery for injuries, is a matter of some doubt. There are many cases holding that he is not;[6] but there are other well-considered cases in which it is argued that he is.[7]

1 *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468; S. C. Thompson on Carriers, 31, where the appellee was riding free upon the invitation of appellant's president when the injury was sustained; Todd v. Old Colony R. R. Co. 3 Allen, 18; Jacobus v. St. Paul etc. R. R. Co. 20 Minn. 125; Rose v. Des Moines Valley R. R. Co. 39 Iowa, 246. *Cf.* Prince v. International etc. R. R. Co. 64 Texas, 144; *Steamboat New World v. King*, 16 How. 439; S. C. Thompson on Carriers, 175; Beach on Contributory Negligence, §§ 176, 178, 303, 309.

2 Pittsburgh etc. R. R. Co. v. Caldwell, 74 Pa. St. 421; Washburn v.

Nashville etc. R. R. Co. 3 Head, 638; *Wilton v. Middlesex R. R. Co.* 107 Mass. 106; S. C. Thompson on Carriers, 438.

3 Austin v. Great Western R'y Co. Law R. 2 Q. B. 442.

4 Houston etc. R. R. Co. v. Moore, 49 Texas, 31; 30 Am. Rep. 98; Eaton v. Delaware etc. R. R. Co. 57 N. Y. 382.

5 Austin v. Great Western R'y Co. Law R. 2 Q. B. 442.

6 Morgan v. Vale of Neath R'y Co. Law R. 1 Q. B. 149; Feltham v. England, Law R. 2 Q. B. 33; Tunney v. Midland R'y Co. Law R. 1 Com. P. 291; Russell v. Hudson River R. R. Co. 17 N. Y. 134; Kansas Pacific R. R. Co. v. Salmon, 11 Kan. 83; Ryan v. Cumberland Valley R. R. Co. 23 Pa. St. 384; Little Schuylkill Navigation Co. v. Norton, 24 Ill. 465; Moss v. Johnson, 22 Ill. 633; Gilman v. Eastern R. R. Co. 10 Allen, 233; Turney v. Midland R'y Co. Law R. 1 Com. P. 291.

7 Fitzpatrick v. New Albany etc. R. R. Co. 7 Ind. 463; Gillenmater v. Madison etc. R. R. Co. 5 Ind. 340; Ohio etc. R. R. Co. v. Muhling, 30 Ill. 9

§ 974. Age, sex and physical condition.—Railway companies are presumed to know that persons in feeble health are frequently among the number of their passengers;[1] and while it would, perhaps, be stating the case too strongly to say that carriers by rail must exercise especial care to guard the infirm from injury,[2] they will not be heard to say, in answer to a charge of negligence, that the injury would not have occurred but for the plaintiff's physical disability,[3] nor that he ought not to have undertaken the journey.[4] And they will be held answerable to the full extent of the injuries, although, owing to the plaintiff's physical condition or latent disease, they were more serious and difficult to cure than if he had been a person of robust health.[5] Upon issues of contributory negligence, the jury should take into consideration the age, sex and physical condition of the plaintiff in each case, in determining what degree of care and prudence the person injured was capable of exercising.[6] A person in feeble health,[7] children,[8] and pregnant women, are not to be judged by the standard of the ideally prudent man in the full vigor of the prime of life.[9]

1 East Line etc. R'y Co. v. Rushing, 69 Tex. 306.

2 Simms v. South Carolina R'y Co. 26 S. C. 490; Strand v. Chicago etc. R'y Co. 67 Mich. 330; Frazer v. South & N. Alabama R. R. Co. 81 Ala. 185.

3 East Line etc. R'y Co. v. Rushing, 69 Tex. 306; Shenandoah Valley R. R. Co. v. Moose, 83 Va. 827; Beach on Contributory Negligence, §§ 204, 205, 390-393.

4 Shenandoah Valley R. R. Co. v. Moose, 83 Va. 827. *Cf.* Georgia Central etc. R. R. Co. v. Usry (Georgia, 1889).

5 Owens v. Kansas City etc. R. R. Co. (1888) 95 Mo. 169; 6 Am. St. Rep. 39; Chicago etc. R. R. Co. v. Sullivan (Illinois, 1888).

6 Hickman v. Missouri Pacific R'y Co. 91 Mo. 433.

7 Pennsylvania R. R. Co. v. Peters, 116 Pa. St. 206.

8 Hemmingway v. Chicago etc. R'y Co. 72 Wis. 42; Muehlhausen v. St. Louis R. R. Co. 91 Mo. 332.

9 Baltimore etc. R. R. Co. v. Kane, 69 Md. 11; Georgia Central etc. R. R. Co. v. Usry (Georgia, 1889).

§ 975. **Unprecedented accidents.**—A railroad company is not liable for unforeseen and unprecedented accidents.[1] It is bound to guard against only such combinations of circumstances as, in the light of past experience, may constitute a source of danger;[2] and it will be held free from blame in the administration of its affairs, when conforming to the methods generally followed by prudent companies.[3]

1 Wabash etc. R'y Co. v. Locke (1887), 112 Ind. 404; 2 Am. St. Rep. 193. *Cf.* Beach on Contributory Negligence, § 38.

2 Wabash etc. R'y Co. v. Locke, 112 Ind. 404; 2 Am. St. Rep. 193. But see Merwin v. Manhattan R'y Co. 48 Hun, 603, where although three hundred thousand persons per day had been carried in safety for six years, the company was held liable for not having guarded the open space between its cars into which the plaintiff's intestate was jostled by the crowd and killed.

3 Alabama Gt Southern R. R. Co. v. Arnold (1887), 84 Ala. 159; 5 Am. St. Rep. 354.

§ 976. **Presumption of negligence.**—The degree of care which the carrier should observe is, in a certain sense, a question of law;[1] that is to say, there are cases in which, certain facts being shown, the carrier will be presumed to have been negligent as a matter of law;[2] as, for example, where it has

failed to keep its road-bed in repair, to furnish road-worthy vehicles and other proper appliances, and to take reasonable precautions against dangers likely to arise.[3] A presumption of negligence frequently arises from the mere fact that the accident occurred;[4] and the burden is then upon the defendant to show due care.[5] Thus, it is held to arise from the mere fact that a train ran off the track,[6] and from the fact of a collision.[7] So, also, a street-car company will be held guilty of gross negligence, in permitting passengers to get on the car in a crowded condition, collecting fare of them, and letting them stand on the platform, where they may be injured by a passing car.[8] But the circumstances under which injuries and accidents occur are so diverse, and vary to such an extent in detail, that it is generally a question of fact for the jury to determine, whether, in a particular case, that degree of care which the law requires, was duly observed.[9] The jury cannot, without proof, infer the existence of a defect.[10]

1 Chicago etc. R. R. Co. v. Pillsbury, 123 Ill. 9; 6 Am. St. Rep. 483.

2 Wichita etc. R. R. Co. v. Davis, 37 Kan. 743; 1 Am. St. Rep. 275.

3 Chicago etc. R. R. Co. v. Pillsbury, 123 Ill. 9; 5 Am. St. Rep. 483; Topeka City R. R. Co. v. Higgs, 33 Kan. 375; 5 Am. St. Rep. 754; *Christie v. Griggs* (1803), 2 Camp. 79; S. C. Thompson on Carriers, 181.

4 Central R. R. Co. v. Sanders, 73 Ga. 513; Pennsylvania R. R. Co. v. Raiordon, 119 Pa. St. 577; 4 Am. St. Rep. 670; *Curtis v. Rochester & Syracuse R. R. Co.* 18 N. Y. 534; S. C. Thompson on Carriers, 148.

5 *Stokes v. Saltonstall*, 13 Pet. 181; aff'g S. C. *sub. nom.* Saltonstall v. Stockton, Taney's Dec. 11; S. C. Thompson on Carriers, 183. *Cf.* Hill v. Ninth Ave. R. R. Co. 109 N. Y. 239. But see Wabash etc. R'y Co. v. Locke, 112 Ind. 404; 2 Am. St. Rep. 193; Little Rock etc. R'y Co. v. Eubanks, 48 Ark. 460; 3 Am. St. Rep. 245.

6 Central R. R. Co. v. Sanders, 73 Ga. 513; Murphy v. Coney Island etc. R. R. Co. 33 Hun, 193; Texas etc. R'y Co. v. Suggs, 62 Tex. 323.

7 Smith v. St. Paul City R'y Co. 32 Minn. 1; 50 Am. Rep. 550.

8 Topeka City R. R. Co. v. Higgs (1888), 33 Kans. 375; 5 Am. St. Rep. 754. *Acc.* Merwin v. Manhattan Elevated R'y Co. 43 Hun, 603.

9 *Stokes v. Saltonstall*, 13 Pet. 150; Boyce v. Anderson, 2 Pet. 150; Brockway v. Lasala, 1 Edw. Ch. 135; Maverick v. Eighth Ave. R. R. Co. 36

N. Y. 378; Johnson v. Winona etc. R. R. Co. 11 Minn. 296; Fuller v. Naugatuck R. R. Co. 21 Conn. 563; Hall v. Connecticut River R. R. Co. 13 Conn. 326; Wichita etc. R. R. Co. v. Davis, 37 Kan. 743; 1 Am. St. Rep. 275.

10 Little Rock etc. R'y Co. v. Eubanks, 48 Ark. 460; 3 Am. St. Rep. 245.

§ 977. **Contributory negligence.** — When the person injured by a railway company might, by the exercise of due care, have avoided the consequences of the defendant's act, he is deemed to have contributed to the injury, and is barred from recovering damages therefor.[1] Thus, a railway company will not be held liable for injuries received by a passenger boarding or alighting from a car or train while in rapid motion,[2] negligently and unnecessarily leaving his seat while the train is in motion,[3] riding on platforms and in other places not designed for the accommodation of passengers,[4] volunteering to act as a brakeman,[5] disregarding warning of danger,[6] or traveling on the Sabbath day contrary to the statutes of the State.[7] But slight negligence on his part will not preclude his recovering of the company if it is shown to have been grossly negligent in comparison.[8] It is for the jury to determine in each case whether the passenger was guilty of contributory negligence, and whether the injury would not have been received but for his failure to exercise due care in seeking to avoid the consequences of the defendant's acts or omissions.[9] The plaintiff need not allege nor produce evidence to show that he did not contribute to the injury.[10] Contributory negligence on the part of the plaintiff, when relied upon by the defendant, must be specially pleaded and proven.[11] Pleading it does not throw the burden of disproving it upon the plaintiff.[12]

1 Wabash etc. R'y Co. v. Central Trust, 23 Fed. Rep. 738; *Stokes* v.

Saltonstall, 13 Pet. 181; aff'g S. C. *sub nom.* Saltonstall v. Stockton, Taney's Dec. 111; S. C. Thompson on Carriers, 183; *Morrissey v. Wiggins Ferry Co.* (1867) 43 Mo. 380; S. C. Thompson on Carriers, 243. But see Merrill v. Eastern R. R. Co. 139 Mass. 252, where, in an action of tort against a railway company under the Massachusetts statute (Mass. Pub. Stat. ch. 112, § 212), for injuries to a passenger, the fact that he failed to exercise due care was held not to constitute a good defense.

2 *Vide infra*, §§ 937, 988 and 989.

3 *Vide infra*, § 992.

4 *Vide infra*, § 993.

5 Propst v. Georgia Pacific R'y Co. 83 Ala. 518.

6 *Vide infra*, § 1000.

7 Bucher v. Cheshire R. R. Co. 125 U. S. 555, following the Massachusetts decisions, though not approving their soundness.

8 Lake Shore etc. R. R. Co. v. Brown, 123 Ill. 162; 5 Am. St. Rep. 510; Lake Shore etc. R'y Co. v. O'Conner, 115 Ill. 254; Calumet Iron and Steel Co. v. Martin, 115 Ill. 338; Chicago & A. R. R Co. v. Dillon, 17 Ill. App. 355.

9 City Railway Co. v. Lee (1883), 50 N. J. 435; 7 Am. St. Rep. 798; Wandell v. Corbin, 49 Hun, 603.

10 McKimble v. Boston etc. R. R. Co. 139 Mass. 542; Hawes v. Burlington etc. R'y Co. 64 Iowa, 315.

11 Hawes v. Burlington etc. R'y Co. 64 Iowa, 315.

12 Hawes v. Burlington etc. R'y Co. 64 Iowa, 315; Texas Pacific R'y Co. v. Davidson, 68 Tex. 370; Gulf etc. R'y Co. v. Williams, 70 Tex. 159.

§ 978. Intersecting roads—Thorogood v. Bryan denied.—Under the English common law, in the case of injuries resulting from the collision of two vehicles belonging to different carriers, the negligence of the one in fault was imputed to his passengers, and they were debarred from recovering against the other carrier.[1] This doctrine, however, has been generally denied on this side of the Atlantic.[2] In this country, a passenger may recover for an injury sustained through the negligence of another company than that carrying him, whether the latter was or was not partly in fault.[3] And the same right has at last been accorded him in England.[4] The passenger, of course, has his remedy against his own carrier, when it has been guilty of negligence.[5] And the two companies may be sued jointly, if the servants of both were negligent.[6]

Where railroad tracks intersect, or where a street-car track crosses a railway, the greatest care and prudence, every practicable precaution that human foresight can devise, should be taken to avoid collision.[7] Greater care should be observed by drivers of street-cars on approaching a railway crossing when the view is obstructed by buildings than when it is clear; and in case of doubt, a driver should stop his car, and go ahead on foot, to ascertain whether a train be approaching or no.[8]

1 *Thorogood v. Bryan* (1849), 8 Com. B. 114, 129; S. C. Thompson on Carriers, 273; Beach on Contributory Negligence, §§ 65, 108-118, 139.

2 *Barnett v. New Jersey Railroad and Transportation Co.* (1873), 37 N. J. 225; Thompson on Carriers, 281; Beach on Contributory Negligence, § 114.

3 Pittsburg C. R'y Co. v. Spencer, 98 Ind. 186; Flaherty v. Northern Pacific R'y Co. (1888) 39 Minn. 328.

4 *The Bernina* (1887), Law R. 12 P. D. & Admiralty Div. 58, 82, where Lord ESHER, M. R., says: "After having thus laboriously inquired into the matter, and having considered the case of Thorogood v. Bryan (3 Com. B. 115), we cannot see any principle on which it can be supported; . . . . the preponderance of judicial and professional opinion in England is against it, and the weight of judicial opinion in America is also against it."

5 Coddington v. Brooklyn Crosstown R. R. Co. 102 N. Y. 63; Central Passenger R'y Co. v. Kuhn (1888), 86 Ky. 573; Pratt v. Chicago etc. R'y Co. (1888) 38 Minn. 455.

6 Flaherty v. Northern Pacific R'y Co. (1888) 39 Minn. 328.

7 Coddington v. Brooklyn Crosstown R. R. Co. 102 N. Y. 66; Central Passenger R'y Co. v. Kuhn, 86 Ky. 578.

8 Central Passenger R'y Co. v. Kuhn, 86 Ky. 578.

§ 979. Intoxication as contributory negligence. In actions against carriers by rail for injuries resulting from negligence, the defendant may plead that the plaintiff was at the time of the accident, partly under the influence of liquor, and if the jury find that fact to have contributed to produce the injury, the verdict should be for the defendant.[1] Thus, where a railway company was sued for damages for personal injuries, received in alighting from its train, and it appeared that the person injured was

at the time of the accident under the influence of liquor, a charge to the jury, that they "might consider the fact of plaintiff's drinking as a circumstance bearing upon the question of reasonable diligence and caution," was held insufficient, as the instruction should have been that if the drinking "contributed at all to the injury, plaintiff could not recover;"[2] for partial intoxication does not excuse the passenger from exercising ordinary care and prudence.[3] And the company's servants, not knowing of the intoxicated condition of a passenger, are not bound to exercise greater care toward him than toward others in a normal condition.[4]

1 Strand v. Chicago etc. R'y Co. 67 Mich 380; Beach on Contributory Negligence, §§ 204, 205, 390 398.

2 Strand v. Chicago etc. R'y Co. 67 Mich. 380.

3 Evans v. Missouri Pacific R'y Co. (1888) 71 Tex. 361.

4 Strand v. Chicago etc. R'y Co. 67 Mich. 380.

§ 980. Injuries from protruding one's arm from a car window.—It cannot be said as a matter of law that it is contributory negligence for a passenger to rest his arm upon the sill of an open window of a street-car,[1] or a steam-railway carriage, while it is in motion, provided he does not protrude it beyond the sill.[2] His negligence in such a case is a question of fact for the jury.[3] Thus, in a late case in New York, it was held that where a passenger sat with his arm resting on the window-sill, but according to the weight of evidence, not extending without, and some part of a passing freight train struck and seriously injured the arm, a want of proper care on the part of the railroad company was to be presumed, and unless the contrary could be shown, a verdict for the plaintiff

should be sustained.[4] Even if he does allow his arm to protrude beyond the window-sill, yet if the company's servants see his danger and fail to warn him, he may recover damages notwithstanding his negligence.[5]

1 Germantown Pass. R'y Co. v. Brophy, 105 Pa. St. 38.
2 Breen v. New York Central etc. R. R. Co. 109 N. Y. 297.
3 Quinn v. South Carolina R'y Co. (1888), 29 S. C. 381; Dahlberg v. Minneapolis St. R'y Co. 32 Minn. 404; 50 Am. Rep. 585.
4 Breen v. New York Central etc. R. R. Co. (1888), 109 N. Y. 297.
5 Dun v. Seaboard etc. R. R. Co. (1885) 78 Va. 645; 49 Am. Rep. 388.

§ 981. **Dangerous premises and approaches.**— The duty of railway carriers to provide safe means of going to and departing from their stations, and their duty to preserve passengers from injury while in and about their depots, has been already treated, incidentally, in connection with the beginning and termination of the contract of carriage; and that the railway company is liable for injuries to passengers occasioned by its neglect of duty in this respect is well established by the cases there cited.[1] Further illustrations of the rule will be found in an early case, where a passenger was injured by a weighing machine on the carrier's platform;[2] and in a more recent case, where a person had purchased a ticket and was properly waiting for the train, the company was held liable for an injury to him caused by a blow from a mail-bag thrown by a government clerk from the postal car, cognizance being shown on the part of the company of the habit of throwing out the bags in this way, and no steps to prevent an accident having been taken by them.[3] The railway company, however, is not bound to keep its premises absolutely safe, and it is

not liable for accidents due to want of ordinary care on the part of the injured person.[4] Thus, it is a question for the jury to decide, whether or not a person was guilty of contributory negligence in standing on the edge of a station platform, with his back to the track waiting for a train, when he was struck by the broken and projecting step of another train.[5] So, where a person on going down the stairway leading from an elevated railway, slipped and fell on account of the steps being covered with sleet, the company was held not to be liable, upon its being shown that the stairway was inclosed to the height of the hand-rails, and was covered by a roof projecting about a foot on both sides.[6] A railroad company which provides proper and safe means of egress from its depot platforms to the public highway is not liable to one who seeks to attain the highway by way of the railroad track, and is injured by falling into a cattle-guard.[7] But a passenger cannot be charged with contributory negligence in going outside of the station yard to enter the coach he wishes to take, when it has been left there, and a sidewalk constructed and controlled by the company leads directly thereto.[8]

1 *Vide supra*, § 857. See, also, Wabash etc. R'y Co. v. Locke (1887), 112 Ind. 404; 2 Am. St. Rep. 193; Green v. Pennsylvania R. R. Co. (1885), 31 Fed. Rep. 66; Alabama etc. R. R. Co. v. Arnold (1887), 84 Ala. 159; 5 Am. St. Rep. 354; Weeks v. New Orleans etc. R. R. Co. (1888), 40 La. Ann. 800; Carpenter v. Boston etc. R. R. Co. 97 N. Y. 494; 49 Am. Rep. 540; Cross v. Lake Shore etc. R'y Co. (Mich. 1888) 14 Western Rep. 81; Moore v. Wabash etc. R'y Co. 84 Mo. 481; Texas etc. R'y Co. v. Orr, 46 Ark. 182; *Longmore v. Great Western R. R. Co.* 19 Com. B. N. S. 183; S. C. Thompson on Carriers, 81; *Nicholson v. Lancashire and Yorkshire R. R. Co.* 3 Hurl. & C. 534; S. C. Thompson on Carriers, 85; *Toomey v. London, Brighton and South Coast R'y Co.* 3 Com. B. N. S. 146; S. C. Thompson on Carriers, 72.

2 *Cornman v. Eastern Counties R'y Co.* 4 Hurl. & N. 781; S. C. Thompson on Carriers, 76.

3 Carpenter v. Boston & Albany R. R. Co. 97 N. Y. 494; 49 Am. Rep. 540.

4 Wabash, St. L. & P. R'y Co. v. Locke, 112 Ind. 404; 2 Am. St Rep. 193.

5 Lonier v. Boston & A. R. R. Co. 141 Mass. 10.

6 Kelley v. Manhattan R'y Co. (1889), 112 N. Y. 443. *Cf. Crafter v. Metropolitan R'y Co.* Law R. 1 Com. P. 300; S. C. Thompson on Carriers, 83.

7 Sturgis v. Detroit etc. R'y Co. (Michigan, 1888).

8 Moses v. Louisville, N. O. & T. R. R. Co. 39 La. An. 649; 4 Am. St. Rep. 231.

§ 982. **Injuries from the carrier's failure to provide lights at its stations and platforms.**—In the absence of contributory negligence on his part, a passenger may recover of a railway company for an injury sustained by him in consequence of the company's neglect to provide sufficient lights at its station for the accommodation and safety of passengers arriving or departing upon its trains.[1] Since schedules of the times of arrival and departure of trains at the depots at which they stop, published by a railroad company, are an invitation to persons desiring to use the road to be at the depots at the time of, and a reasonable time before, the arrival and departure of trains, the company will be held liable in damages to a person, who coming in good faith to a depot to take passage, within a reasonable time before the departure of a train, suffers injury by reason of its failure to properly light its platform and depot.[2] For he is none the less a passenger because of not yet having purchased his ticket.[3] It is for the jury to determine under the circumstances of each case what is a reasonable time.[4] It is negligence for a railway company on any account to obstruct the lights placed by the city to lighten both sides of its track, by leaving one or more passenger coaches outside of the depot yard or station grounds.[5] A person cannot be

deemed *prima facie* guilty of a want of ordinary care, where, after purchasing his ticket he remains in the office until the announcement of the approach of the train, and being familiar with the situation neglects to call for a light or assistance in taking the train.[6] The rule in regard to lighting its regular places for boarding and leaving its trains applies also to cases where the passenger is directed to get on or off from a car at an irregular place.[7] But a railway company was held not liable for injuries sustained by a passenger, in alighting from the train on to the station platform, which, although at a short distance from the car steps, had never before caused injury or inconvenience to any one, where it appeared that the place was lighted as usual, by the conductor's lantern and the lights from the windows of the car and the depot.[8] And a passenger, who while staying over at a station on a dark night walked to the end of the platform while the lamp had been temporarily removed to be trimmed, was considered to have been guilty of recklessness and to have no cause of action.[9]

1 Fordyce v. Merrill, 49 Ark. 277; Groll v. Prospect Park R. R. Co. (1889), 51 Hun, 643; Moses v. Louisville N. O. & T. R. R. Co. 39 La. An. 649; 4 Am. St. Rep. 231; Alabama etc. R. R. Co. v. Arnold, 80 Ala. 600; S. C. 84 Ala. 159; Reynolds v. Texas & Pacific R. R. Co. 37 La. An. 694; Duenemann v. St. Paul etc. R'y Co. 32 Minn. 390; Griffith v. Missouri Pacific R'y Co. (Missouri 1889).

2 Grimes v. Pennsylvania R. R. Co. (1888), 36 Fed. Rep. 72.

3 Grimes v. Pennsylvania R. R. Co. (1888), 36 Fed. Rep. 72; and cases cited *supra*, §§ 854, 855, 857.

4 Grimes v. Pennsylvania R. R. Co. (1888), 33 Fed Rep 72.

5 Moses v. Louisville, N. O. & T. R. R. Co. 39 La. An. 649; 4 Am. St. Rep. 231.

6 Alabama G. S. R. R. Co. v. Arnold, 80 Ala. 600.

7 Smith v Central R. & B. Co. (1888), 80 Ga. 519.

8 Laffin v. Buffalo & S. W. R. R. Co. 106 N. Y. 136.

9 Reed v. Richmond etc. R. R. Co. (Virginia, 1883).

§ 933. **Injuries to passengers crossing tracks at railway stations.**—Passengers crossing a rail road track at a station, in order to leave or board a train halted for that purpose, are not held to the same care and diligence as persons crossing tracks, but may assume that the railroad corporation will so order its trains that they will be safe from harm on the track, which they are thus invited and required to cross in order to secure passage.[1] Although a railway company may supply the demand of the traveling public for rapid transit, by running trains at a high rate of speed along those parts of its track where persons have no right to be, yet in passing stations, particularly where the ticket-office and the platform are on different sides of the track, so that passengers are obliged to cross after having bought their tickets, the company must look out for the safety of those so crossing, and an engine approaching such a station at a high rate of speed about the time when a passenger train is due, must slow up and sound signals of warning, even though the station be only a flag-station.[2] There is a somewhat analogous decision in a case against a street-car company for an injury to the plaintiff, who, at the request of the driver of the car in which he was a passenger, was assisting in backing it to its proper position on the track and was injured by another car of the company passing at the time.[3] But a woman was charged with contributory negligence, who, after having purchased her ticket, was directed by the agent to cross the track to the other platform, but when part of the way across, remembered a bundle she had left behind, returned for it, and notwithstanding warn-

ings given her, then attempted to cross, when she was killed by the train, the evidence being in conflict as to whether the train was a half or a quarter of a mile distant when she was told by the agent to cross.[4]

1 Weeks v. New Orleans etc. R. R. Co. (1838) 40 La. An. 800; Louisville, N. O. & T. R. R. Co. v. Thompson (1887), 64 Miss. 584; Nichols v. Chesapeake, O. & S. W. R. R. Co. 8 Ky. Law Rep. 519; Parsons v. New York Central etc. R. R. Co. 113 N. Y. 355.

2 Nichols v. Chesapeake, O. & S. W. R. R. Co. 8 Ky. Law Rep. 519.

3 McIntire St. R'y Co. v. Bolton (1886), 43 Ohio St. 224; 54 Am. Rep. 803.

4 Baltimore & O. R. R. Co. v. State (1885), 63 Md. 135.

§ 984. Imperfect appliances for boarding and alighting.—While it is not incumbent upon the carrier's conductor to assist passengers in getting on or from the cars, when they have been stopped at the proper place, and suitable and safe means are provided for boarding and alighting,[1] yet it is the duty of the carrier to afford safe and suitable means of ingress and egress to and from its trains; and it is liable for injuries to passengers occurring by reason of defective facilities for boarding and alighting from their cars. For passengers, observing due care and caution, have a right to rely upon the presumption that the carrier has done its duty in maintaining safe depots, platforms, etc.[2] For example, damages have been recovered for injuries where the platform of an elevated railway station was so constructed that an open space was left between it and the platform of the car;[3] where the defect consisted of broken planks in the station platform, at a place where passengers would naturally walk on leaving the trains;[4] where a box, upon which passengers had to step in getting from a car to the ground, there being no station platform,

tipped over as the plaintiff stepped upon it;[5] where a pregnant woman was obliged to step up from the ground to a height of thirty or thirty-six inches;[6] and where the car steps and the station platform were of different heights.[7] Where two railroad companies jointly maintain a platform over which passengers would naturally pass in going from the station of one company to that of the other, to take passage on the train of the latter, both companies are liable for injuries to a passenger so doing, resulting from the defective condition of the platform.[8] In these cases, evidence that other persons have fallen and been injured in the same place is admissible;[9] as, also, it would seem, it is permitted to show that other passengers under the same circumstances were not injured.[10] But the fact that the appliances have been in daily use for years, without accident, is no defense; for the company is bound to furnish the safest facilities practicable under the circumstances, such as prudent and competent persons in the same business would employ.[11]

1 Hurt v. St. Louis etc. R'y Co. (1888) 94 Mo. 255; Raben v. Centr. Iowa R'y Co. (1887) 73 Iowa, 579; Simms v. South Carolina R'y Co. (1887) 26 S. C. 490.

2 Louisville, N. A. & C. R'y Co. v. Lucas (Indiana, 1889); New York C. & St. L. R'y Co. v. Doane (1887), 115 Ind. 435; 7 Am. St. Rep. 451; *M'Donald v. Chicago and N. W. R. R. Co.* 26 Iowa, 124; S. C. Thompson on Carriers, 93. *Cf.* Potter v. Wilmington & W. R. R. Co. (1886) 92 N. C. 51; Hitchcock v. Brooklyn City R. R. Co. (1889) 50 Hun, 606; *Pittsburg, Ft. Wayne etc. R. R. Co. v. Brigham*, 29 Ohio St. 374; S. C. Thompson on Carriers, 101.

3 Brady v. Manhattan R'y Co. (1889) 25 N. Y. St. Rep. 585.

4 Louisville, N. A. & C. R'y Co. v. Lucas (Indiana, 1889).

5 Missouri Pacific R'y Co. v. Wortham (Texas, 1889).

6 Missouri Pacific R'y Co. v. Watson (Texas, 1889).

7 Turner v. Vicksburg etc. R. R. Co. 37 La. An. 648; 55 Am. Rep. 514.

8 Lucas v. Pennsylvania Co. (Indiana, 1889.)

9 Missouri Pacific R'y Co. v. Neiswanger (Kansas, 1889).

10 Missouri Pacific R'y Co. v. Wortham (Texas, 1889); Missouri Pacific R'y Co. v. Watson (Texas, 1889).

11 Missouri Pacific R'y Co. v. Wortham (Texas, 1889).

§ 985. **The same subject, continued.**—But in cases of injury from defective stations, platforms, *et cetera*, the law does not presume negligence on the part of the carrier from the accident itself. It still remains for the jury to determine the negligence and contributory negligence of the carrier and passenger respectively.[1] Thus, it is a question for the jury whether the construction of a platform at an unusual height and four feet from the car platform constitutes negligence.[2] And the company may show that a distance of from two to six inches or more between the car steps and station platform is essential in operating the road; and that it is impossible to have the platform on exactly the same level, owing to the difference in height between the springs of different cars.[3] So, on the other hand, it has been held, in an action against a railroad company for personal injuries caused by falling through a trestle while alighting from a train in the dark, that it is error to take the question of negligence from the jury by instructing that if plaintiff alighted without directions to do so by the company's servants, and with knowledge of the station, such act constituted negligence on his part.[4] The passenger's knowledge of the peculiar construction of a platform at a station does not render him chargeable with a greater degree of caution than is incumbent upon all other persons.[5] Evidence showing that plaintiff's injuries were caused by his slipping on defendant's platform on alighting from a train; that, when the accident occurred, snow and sleet were falling, and the platform where he was compelled to alight was slippery from ice or snow; that on the preceding day con-

siderable snow had fallen, and that, though an attempt had been made to remove the snow from the platform, no sand or ashes had been sprinkled over it, establishes a *prima facie* case of negligence against the company, and justifies a verdict for plaintiff.[6] But in another case it was held that a railroad company, in permitting the accumulation of snow and ice in moderate quantities on the platforms of its cars during a night-run in a storm of snow and sleet, is not guilty of such negligence as would warrant a recovery for injuries in consequence thereof, particularly by one cognizant of the condition of the platforms.[7] A passenger, who is injured in alighting from a train, according to the directions of the conductor, the directions being within the scope of his authority, cannot be charged with contributory negligence, unless by obeying the directions he is exposed to an obvious risk, which a prudent man would not incur.[8]

1 Gulf etc. R. R. Co. v. Fox (Texas, 1888); Missouri Pacific R'y Co. v. Neiswanger (Kansas, 1889).

2 Gulf etc. R. R. Co. v. Fox (Texas, 1889). *Cf.* Stafford v. Hannibal etc. R. R. Co. (1886), 23 Mo. App. 333.

3 Hanrahan v. Manhattan R'y Co. (1889), 53 Hun, 420.

4 International & G. N. R. R. Co. v. Eckford, 71 Tex. 274.

5 Gulf etc. R. R. Co. v. Fox (Texas, 1889); International & G. N. R. R. Co. v. Eckford (1888), 71 Tex. 274. But see Palmer v. Pennsylvania R. R. Co. (1889), 111 N. Y. 488, where the plaintiff's knowledge of the accumulation of snow and ice on the platform of the cars was taken into consideration.

6 Timpson v. Manhattan R'y Co. (1889) 52 Hun, 489.

7 Palmer v. Pennsylvania R. R. Co. 111 N. Y. 488.

8 Cincinnati, H. & I. R. R. Co. v. Carper (1887), 112 Md. 26; St. Louis, I. M. & S. R'y Co. v. Person (1887), 49 Ark. 182.

§ 986. **Boarding and alighting at irregular places.** —A carrier of passengers is bound to afford a passenger a reasonable opportunity for alighting

at the usual depot, and cannot require the passenger to alight at an unusual place, as a side-track or a switch. For injuries thus occasioned it is liable.[1] And for a passenger to board a train at any other point than at the platform of a depot is not necessarily negligence.[2] In a late case of an injury arising from boarding at an irregular place, instructions to the jury ignoring the fact that the place at which the accident occurred, though not the regular platform built for the accommodation of passengers entering and leaving defendant's trains, was a place at which the trains were frequently boarded without objection, and that a person in the uniform of the defendant's officers directed the passenger to get on at that point, and informing the jury that, if defendant had provided an exclusive place for passengers to use in entering and leaving its trains, of which the passenger was aware, or might by ordinary care have known, plaintiff could not recover, were held to have been properly refused.[3] And for a person to alight at a dangerous place, and in a dark night, from a train which has run past his station, does not constitute negligence *per se*.[4] In the case of street cars, an action may be maintained against the company for an injury to a passenger, caused by the negligence of the driver in so handling the brake as to strike him in getting off, even though there be a law exempting companies from liability for injuries to passengers, caused by their alighting from the front platform of a car;[5] nor is a person, as a matter of law, guilty of contributory negligence, so as to justify a nonsuit, merely because the injury was sustained through his alighting from the wrong side of a train.[6] But in a recent case in Pennsyl-

vania it was held that a passenger who, on leaving the train at a place where passengers are received and discharged, without station or platform, gets off on the track side, instead of getting off on the side where passengers usually alight, is properly nonsuited, in an action for injuries received by passing train, though he testifies that the track side was the leveler surface and the easier place to alight; it not appearing that the other side was dangerous.[7] So it has been held to be contributory negligence, and to bar recovery, for a passenger to assume the risk of alighting at a dangerous place when in the exercise of ordinary care he might safely gain the platform by passing through the forward car.[8]

1 White Water Valley R. R. Co. v. Butler (1888), 112 Ind. 598; McGeer v. Missouri Pacific R'y Co. (1887) 92 Mo. 208; 1 Am. St. Rep. 706; Van Ostram v. New York etc. R. R. Co. 35 Hun, 590; Griffith v. Missouri Pacific Railway Co. (Missouri, 1889), where the passenger was directed to get off at a place other than the regular station, without warning of the danger.

2 Stoner v. Pennsylvania Co. (1885) 98 Ind. 384; 49 Am. Rep. 764.

3 Baltimore & O. R. R. Co. v. Kane (1889), 69 Md. 11.

4 Terre Haute & I. R. R. Co. v. Buck (1885), 96 Ind. 346; 49 Am. Rep. 168.

5 Nissen v. Missouri R. R. Co. 19 Mo. App. 662.

6 McQuilken v. Central Pacific R. R. Co. 64 Cal. 463; Robostelli v. New York etc. R. R. Co. (1888), 33 Fed. Rep. 796.

7 Morgan v. Camden & A. R. Co. (Pa. 1889) 23 Week. Notes Cas. 189.

8 Eckerd v. Chicago & N. W. R'y Co. 70 Iowa, 353.

§ 987. Boarding and alighting from trains in motion—(*a*). Contributory negligence.—It may be said by way of broad generalization that a passenger who attempts to board or alight from a moving street-car or steam-railway train, is guilty of contributory negligence, and cannot recover damages from the carrier for injuries resulting therefrom,[1] although otherwise he would have missed

his train, or believed that he would be carried beyond his destination.[2] Thus, the passenger has been considered to have so far contributed to the accident as to relieve the company of liability for injuries occurring in his getting on or from a train or car while in motion, where it appeared that, although ample time was afforded him, he tarried until the signal for starting had been given,[3] even though he may have relied upon the conductor's assertion that the train would stop for a certain length of time;[4] or that he was premature in attempting to get off, no order to alight having been given;[5] that on a dark night the passenger jumped off before the train reached the station, when there was no reason for supposing that it would not stop;[6] that a child jumped off through fear, not caused by any servant of the company;[7] that the plaintiff was injured in attempting to get on a freight train which he had no right to board;[8] that the passenger failed to use his senses in heeding signals of danger sounded by a train approaching on a parallel track;[9] that the place where he attempted to board the train was not a regular station, and that it was going at the rate of several miles an hour.[10] In a Massachusetts case the extraordinary *ratio decidendi* has been taken, that a person who boards a train while it is in motion becomes a "passenger" only upon reaching a safe place inside, and if before so doing he is injured he can have no recovery therefor.[11] The verdict was against the plaintiff in another case where it was shown that he saw a fellow-passenger pull the signal rope, and though knowing the act to be unauthorized, chose to treat it as the act of the com-

pany[12] A judgment of nonsuit was sustained where it appeared that the person injured, and two others, who were before him, endeavored to board a moving elevated railway train; that the conductor opened the gate for the two in advance, and they succeeded in getting on, but the third had the gate closed against him, was carried against a projection, and mortally injured.[13] It is provided in Iowa, by statute,[14] that any person, not an employee of the railway company, or an officer of the law in discharge of his duty, who shall board or alight from any locomotive or car while in motion, without the consent of the person in charge, shall be guilty of a misdemeanor.[15]

1 Missouri Pacific R. R. Co. v. Texas & Pacific R. R. Co. (1889) 36 Fed. Rep. 879; Watson v. Georgia Pacific R'y Co. (Georgia, 1888); Weeks v. New Orleans etc. R. R. Co. (1888) 40 La. An. 800; holding, also, that where a person attempts to board a train while moving, and after it has left the station, he no longer acts on the invitation, or stands under the protection of the company, and, while crossing or occupying the track, is bound to use proper care for his own protection: New York, L. E. & W. R. R. Co. v. Enches (Pa. 1889), 17 Atl. Rep. 991; Jarrett v. Atlanta & W. P. R. R. Co. (Ga. 1889), 9 S. E. Rep. 681; St. Louis etc. R. R. Co. v. Rosenberry (Ark. 1888); Parsons v. New York Central & H. Riv. R. R. Co. 37 Hun, 128; Denver etc. R. R. Co. v. Peckard, 8 Colo. 163.

2 Kansas etc. R. R. Co. v. Dorough (Texas, 1889, not yet reported); Reibel v. Cincinnati, I., St. L. & C. R'y Co. (1888) 114 Ind. 476; Hunter v. Cooperstown etc. R. R. Co. (1889), 112 N. Y. 371; 8 Am. St. Rep. 752; Savannah F. & W. R. R. Co. v. Watts (Ga. 1888), where the train was announced to stop at the station, but ran past it for the purpose of switching back; Hagan v. Philadelphia etc. R'y Co. 15 Phil. 273, a street-car case. *Contra*, Hemmingway v. Chicago, M. & St. P. R'y Co. (1888), 72 Wis. 42; 7 Am. St. Rep. 823, where a child ten years of age, traveling alone, jumped through fear of being carried beyond his destination, the train passing the station to switch back, but the conductor using no precaution to prevent him from jumping.

3 Gulf etc. R'y Co. v. Williams (1888), 70 Tex. 159; Warren v. Southern Kansas R'y Co. (1887) 37 Kan. 408.

4 Missouri Pacific R'y Co. v. Foreman (Texas, 1888).

5 East Tennessee, Va. & Ga. R. R. Co. v. Massengell, 15 Lea, 338. *Cf.* East Tennessee, Va. & Ga. R. R. Co. v. Conner, 15 Lea, 254.

6 South & N. A. R. R. Co. v. Schaufler, 75 Ala. 136.

7 Reary v. Louisville, N. O. & T. R'y Co. (1888) 40 La. An. 32; but in this case the child was not a passenger. *Contra*, Hemmingway v. Chicago, M. & St. P. R'y Co. (1888) 72 Wis. 42; 7 Am. St. Rep. 823, where the conductor did nothing to prevent a child traveling alone from jumping from the car. *Cf.* Lehman v. Louisiana Western R. R. Co. (1886) 37 La. An. 703.

8 Missouri Pacific R'y Co. v. Texas & P. R'y Co. (1888) 34 Fed. Rep. 92.
9 Weeks v. New Orleans, S. F. & L. R. R. Co. (Louisiana, 1888).
10 Denver etc. R. R. Co. v. Pickard, 8 Colo. 163.
11 Merrill v. Eastern R. R. Co. 139 Mass. 238; 52 Am. Rep. 705. As to when a person becomes a passenger, *vide supra*, § 857.
12 Mississippi & T. R. R. Co. v. Harrison (Mississippi, 1889, not yet reported.)
13 Solomon v. Manhattan R'y Co. 103 N. Y. 437; Card v. Manhattan R'y Co. 103 N. Y. 670.
14 Iowa Acts 16th Gen. Assem. ch. 148, § 2
15 Raben v. Central Iowa R'y Co. 73 Iowa, 579.

§ 988. (*b*) **Contributory negligence not presumed from the act itself.**—An attempt to get on or to alight from a street-car[1] or railway train while in motion is not in itself, as a matter of law and under all circumstances, contributory negligence on the part of a passenger.[2] It still remains a question of fact for the jury, whether the defendant was negligent, and whether the injury would not have occurred but for the plaintiff's contributory act.[3] And instructions to the jury that, if the plaintiff acted thus and so he cannot recover, are reversible error, unless it be also submitted to their determination whether those acts were, under the circumstances of the case, contributory negligence on his part.[4] In any given case it is for the jury to determine as to whether due diligence requires that a train should leave on schedule time, or whether persons upon it not as passengers should alight before the time fixed by the schedule for its departure; or whether, when a train is starting or about to start, persons in front of it should take care that it is not moving or about to move, and if so, what degree of diligence should be exercised by them in order to find out if it is starting or about to start.[5] The company will

39. (c.) **Sundry examples.**—The carrier has ... held liable for the injury to a passenger en... voring to board a moving train where it ap... red that his delay was caused by waiting for the ... in to move from a freight platform to the pas... ger platform whereon he was standing, and that was not informed that it would start from the ...mer until it was about to move;[1] also, where a ...man jumped from a street-car while the horses ere running away, there being danger of the car ...lling over an enbankment near at hand, damages ...ere recovered against the company.[2] So, where a ... rain stopped soon after the announcement of the tation by the brakeman, and a passenger, as soon as he could, but not till the train was in motion again, alighted and was injured, it being night and he presuming that he had reached his destination, it was held that the company was liable.[3] Again, an action against the railway company was held maintainable, where the driver of a street-car, under orders to make haste and to receive no passengers, slowed up the car at a signal from a person, who had no means of knowing of such orders, and who attempted to get on and was thrown down and injured, by the driver whipping up the horses.[4] But where a complaint in an action against a railway company alleged that the plaintiff was "compelled and forced" to get off the train while it was moving, and sustained injuries from such "compelling and forcing," but the evidence showed no further degree of force than the admonition by the conductor, "We have got no time. Hurry up!" it was held that the complaint was not sustained.[5]

1 Maclennan v. Long Island R. R. Co. (1886) 52 N. Y. Super. Ct. 22.

2 Dimmey v. Wheeling etc. R. R. Co. (1886), 27 W. Va. 32. *Cf. Jones v. Boyce* (1816), 1 Stark. 493; S. C. Thompson on Carriers, 246, where a passenger under impulse of fear leaped from a stage coach.

3 Memphis & Law R. R'y Co. v. Stringfellow, 44 Ark. 322; 51 Am. Rep. 598.

4 Comer v. Citizen's Street R'y Co. 105 Ind. 62; 55 Am. Rep. 177.

5 South & North Alabama R. R. Co. v. Schaufler, 75 Ala. 136.

§ 990. **Premature starting of trains.**—While it is the duty of the carrier to announce the name of the station, and to stop long enough to give passengers an opportunity to alight,[1] it is not the duty of the conductor to know with absolute certainty, before giving the signal to start, that all passengers for that station have left the cars,[2] and that all persons intending to take passage there have safely entered the train.[3] He is only required, after having the station announced, to stop the train and hold it for a time reasonably sufficient to permit the safe alighting[4] and entering of passengers.[5] But where it appears that the conductor had cause to believe that a passenger was in the act of alighting, and without investigation started the train and precipitated the accident, the company will be liable, even though the passenger was dilatory in getting off.[6] So, also, even though a passenger negligently remains in a waiting-room after being notified to board the train, and, while attempting to get on the train, the officer in charge puts it in motion, knowing that such person is in the act of getting on, and he is injured thereby, the railway company will be liable.[7]

1 Dorrah v. Illinois Central R. R. Co. (1887) 65 Miss. 14; 7 Am. St. Rep. 629; Louisville etc. R. R. Co. v. Mark, 64 Miss. 738.

2 Raben v. Central Iowa R'y Co. (1888) 73 Iowa, 579.

3 Gulf etc. R. R. Co. v. Fox (Texas, 1888).

4 Raben v. Central Iowa R'y Co. (1888) 73 Iowa, 579; Clotworthy v. Hannibal & S. J. R. R. Co. 80 Mo. 220.

5 Gulf etc. R. R. Co. v. Fox (Texas, 1888).
6 Straus v. Kansas City & St. J. R. R. Co. 86 Mo. 421.
7 Gulf etc. R. R. Co. v. Fox (Texas, 1888).

§ 991. Sudden jerking of cars and trains—(a). The carrier's negligence.—It is the duty both of steam-railway and horse-railway carriers,[1] so to regulate the stopping, starting and general movement of their cars and trains, that passengers, exercising ordinary prudence, shall not be injured by sudden jerks.[2] Thus, recovery was allowed a passenger for injuries through the sudden jerking or unexpected forward movement of the train, after a station had been announced, and it had stopped at the accustomed place.[3] The plaintiff having shown that the injury was the result of the sudden jerking of the defendant's car or train, a presumption of negligence on the part of the defendant is thereby raised.[4] A complaint charging negligence in suddenly accelerating the motion of defendant's train while plaintiff was leaving it, need not be made more definite and certain by showing by whom, and by what acts, the motion was suddenly accelerated, and in what respects such acts were negligence; for the pleading is to be construed in view of the general knowledge of the manner of running railway trains, and also because the plaintiff is not bound to plead facts peculiarly within the defendant's knowledge.[5]

1 Black v. Brooklyn City R. R. Co. (1888) 108 N. Y. 640; West End & A. St. R. R. Co. v. Mozely (1838), 79 Ga. 463; Ashbrook v. Frederick Ave. R'y Co. (1886), 18 Mo. App. 290; Dougherty v. Missouri R. R. Co. (1885), 81 Mo. 325; 5 Am. Rep. 239; S. C. (1888) 97 Mo. 647.

2 Decker v. Manhattan R'y Co. (1883), 49 Hun, 607; Dillon v. Manhattan R'y Co. (1888), 49 Hun, 608; Louisville & N. R. R. Co. v. Crunk (Ind. 1888), not yet reported; Gulf etc. R. R. Co. v. Fox (Tex. 1888), not yet reported; Baltimore & O. R. R. Co. v. Kane (1883), 69 Md. 387; Nance v. Carolina Central R. R. Co. 94 N. C. 619; Straus v. Kansas City, St. J. etc. R. R. Co. 86 Mo. 421; Norfolk & W. R. R. Co. v. Prinnell, (Virginia, 1887).

3 Norfolk & W. R. R. Co. v. Prinnell (Virginia, 1887).

4 Dougherty v. Missouri R. R. Co. 81 Mo. 325; 51 Am. Rep. 239. But see West End & A. St. R. R. Co. v. Mozely (1888), 79 Ga. 463, where an instruction to the effect that if, when plaintiff was in the act of alighting the car suddenly started at the will of the driver, and plaintiff was thrown down and received injuries, defendant was liable, was held to be erroneous, as taking from the jury the consideration of the fact whether defendant was guilty of negligence in so doing. See, also, Dillon v. Manhattan R'y Co. (1888), 49 Hun, 608, where the question of the defendant's negligence was held to be a question for the jury.

5 Louisville & N. R. R. Co. v. Crunk (Ind. 1888).

§ 992. *(b).* **Contributory negligence of passenger—Leaving seat.**—The presumption of negligence arising from showing that the plaintiff was injured by the sudden jerking movement of the defendant's car or train, may be rebutted by showing that he contributed to his injury by negligently and unnecessarily leaving his seat while the train was in motion,[1] being actuated by mere restlessness or curiosity,[2] or by showing that he was riding on the platform or other irregular place not intended for passengers.[3] Thus, recovery was denied, on the ground of contributory negligence, where a man standing on the front step of a horse-car, and bowing to his wife inside, was injured by being thrown from the car by its starting suddenly.[4] It is difficult, however, to establish contributory negligence in those cases where, the train having almost stopped, and the passenger, being about to alight, is injured by a sudden and unexpected forward movement of the car;[5] and the same difficulty exists in cases of injury from premature, sudden and unforewarned starting of a car or train before the passenger has had time to board it.[6] In a recent New York case, the plaintiff having one foot on the step of a street-car, it was suddenly started at the signal of the conductor, and he was

thrown off and injured. The plaintiff testified that the platform was crowded, and that by reason of the sudden shock he could not reach it with either foot nor catch hold of the hand-rail. Although the evidence in the case was conflicting, a verdict for the plaintiff was held to be conclusive on the questions of negligence and contributory negligence.[7]

1 Wallace v. Western N. C. R. R. Co. (1888) 98 N. C. 494; Coleman v Second Ave. R. R. Co. (1889) 114 N. Y. 609.

2 State v. Maine Central R. R. Co. (1889), 81 Me. 84.

3 *Vide infra*, § 993; Wallace v. Western North Carolina R. R. Co. 98 N. C. 494; 2 Am. St. Rep. 346.

4 Ashbrook v. Frederick Avenue R'y Co. 18 Mo. App. 290.

5 Nance v. Carolina Central R. R. Co. 94 N. C. 619.

6 Baltimore & O. R. R. Co. v. Kane (1888), 69 Md. 11. *Cf.* Baltimore & O. R. R. Co. v. Kane (Md. 1889).

7 Black v. Brooklyn City R. R. Co. (1888), 108 N. Y. 640.

993. Riding on platforms and other irregular places— (*a.*) **Contributory negligence.**—The carrier may establish contributory negligence on the passenger by showing that the plaintiff was standing on the front platform of a street-car;[1] that the plaintiff persisted in standing upon a platform of the car notwithstanding admonitions of danger, together with the fact that he and others in the same position were the only passengers injured in the accident;[2] that the plaintiff was sitting on the arm of a seat in a mixed freight and passenger train, well knowing that there was more jostling and jerking in the coupling of such trains than in ordinary passenger trains;[3] that the plaintiff was standing up in the caboose of a freight train, although there were seats enough for all the passengers,[4] that the plaintiff was unnecessarily and improperly standin on a platform of the car, knowing that the train was

about to start, and that he was thrown down by the usual and necessary jerking incident to starting the train;[5] that a person complaining of an injury from the lodgment of a cinder in his eye, was riding in an open car when he might have ridden in a covered one;[6] that the plaintiff was attempting to board a freight locomotive on a railway used exclusively for freight, and that the conductor inviting him to do so acted without authority;[7] that the plaintiff was sitting in a chair in a caboose instead of the stationary seats provided for passengers;[8] that it was not the duty of the plaintiff's intestate, who was killed in a collision, to ride in the scenery car of a theatrical company of which he was an employee, and that he was warned by the conductor to go into a regular passenger car in which his ticket entitled him to ride.[9] But the custom of allowing shippers to ride on the engines is admissible to show the plaintiff's right to be so carried.[10]

1 *Burns v. Bellefontaine R'y Co.* 50 Mo. 139; S. C. Thompson on Carriers, 441.

2 Memphis & L. etc. R'y Co. v. Salinger, 46 Ark. 528.

3 Smith v. Richmond & D. R. R. Co. (1888), 99 N. C. 241.

4 Wallace v. Western North Carolina R. R. Co. 98 N. C. 494; 2 Am. St. Rep. 346.

5 Torrey v. Boston & A. R. R. Co. (1888), 147 Mass. 412.

6 Higgins v. Cherokee R. R. Co. (1886) 73 Ga. 149.

7 Files v. Boston & A. R. R. Co. (1888) 149 Mass. 205.

8 Norfolk & W. R. R. Co. v. Ferguson (1885), 79 Va. 241. *Contra*, Quackenbush v. Chicago & N. W. R'y Co. (1883) 73 Iowa, 458, on the ground that the company allowed the chair to be there.

9 Blake v. Burlington, C. R. & N. R'y Co. (Iowa, 1889).

10 Lake Shore & Mich. So. R. R. Co. v. Brown, 123 Ill. 162; 5 Am. St. Rep. 510.

§ 994. (*b*). **Not contributory negligence, there being no seat or room in the car.** — But contributory negligence is not necessarily imputed to the

passenger, when he was forced to ride standing between the seats, or on the platform, or other irregular place, by reason of there being no seat or room for him in those parts of the car or train intended for passengers,[1] provided that otherwise he exercised due care to avoid the ordinary perils incident to occupying such a position.[2] Thus, in a case lately decided, the plaintiff, on account of there being no seats in the car in which he was, went on the platform of another car, and was looking through the window for a seat, when he was injured by a collision caused by the negligence of the railroad servants, and it was held that there was no want of ordinary care on his part, so far as any injury from collision was to be apprehended, and that his conduct did not contribute to bring about the collision, nor the injury.[3] So, also, it is held that, where it is customary in a busy season to allow passengers on street-cars to ride on the side steps of an open car, there being no seats vacant, in the absence of any warning or objection from the conductor, a passenger injured while so riding is not guilty of contributory negligence, and the fact that the passenger was a cripple does not vary the rule.[4] In a recent case in New Jersey, the plaintiff entered a horse-car, the seats and platform of which were filled with passengers, and stood, with other passengers, on the foot-board. There was but a single track where he entered, but further on it was double, and he was injured by contact with a passenger on the foot-board of a car passing on the other track. It appeared that a person might safely stand on the foot-board of one car while passing, if the foot-board of the other

were unoccupied. But the plaintiff was unfamiliar with the management of the road, and did not know that the track was double; and under the circumstances it was held that contributory negligence was not so clearly shown as to warrant the court in withdrawing the case from the jury.[5] Nor is it *per se* negligence for a person to ride even on the front platform of a horse-car, no objection being made thereto, and it is a question for the jury as to whether or not the company was guilty of negligence in failing to provide a guard or fender.[6] Again, where it appeared that the plaintiff escaped death by going from a passenger-car to the baggage-car to smoke, it was held that a charge that the jury should determine whether plaintiff, being where he had no business, contributed to the injury, and that, if it did, he could not recover, was as favorable to defendant as it could ask.[7] It has been held in a Michigan case that for a passenger on an excursion-car to attempt to use the outside running-board on the side of a car, without perceiving that the company has placed coal-bins so near the track as to make it impossible for him to pass, did not constitute contributory negligence.[8] And a railway company cannot escape liability for an injury to a passenger sustained while riding on its engine at the direction of its servants, by showing that he might have procured passage by some other line of travel.[9]

1 Lapointe v. Middlesex R. R. Co. 144 Mass. 18; Werle v. Long Island R. R. Co. 98 N. Y. 650.

2 Merwin v. Manhattan R'y Co. (1888) 48 Hun, 608.

3 Dewire v. Boston etc. R. R. Co. (1889) 148 Mass. 343.

4 Topeka City R'y Co. v. Higgs (1888), 38 Kan. 375.

5 City R'y Co. v. Lee (1888), 50 N. J. 435.

6 West Philadelphia Passenger R'y Co. v. Gallagher (1886), 108 Pa. St. 524.

7 Webster v. Rome etc. R. R. Co. (1889), 23 N. Y. St. Rep. 773.

8 Dickinson v. Port Huron & N. R'y Co. 53 Mich. 43.

9 Lake Shore & M. S. R. R. Co. v. Brown, 123 Ill. 162.

§ 995. (c.) **Not contributory negligence when in the passenger's line of duty, or when acting under the direction of company's servant.**—Nor is the passenger necessarily chargeable with contributory negligence if he took the position in which he was injured on account of his duty in connection with the transportation of live-stock,[1] or at the invitation, or under the direction, of a servant of the company,[2] who had authority to invite or direct him so to do;[3] unless he thereby incurred a risk which an ordinarily prudent man would not have taken.[4] In a recent Nebraska case, there was held to be no error in an instruction that passengers have no right to enter or pass through a baggage-car attached to the train on which they are about to take passage; and, if plaintiff got upon the platform of the rear car, and discovered that the car, or that portion of it next to the platform upon which he got, was set apart for baggage, he would not be negligent in withdrawing therefrom to seek his place in a passenger-car without going through the baggage-car.[5]

1 Florida R'y & Nav. Co. v. Webster (Fla. 1888); Union R'y & Trans. Co. v. Shacklett (1886), 19 Ill. App. 145; Tibby v. Missouri Pacific R'y Co. (1885) 82 Mo. 292.

2 Lake Shore & M. S. R. R. Co. v. Brown (1887), 123 Ill. 162; Union R'y & Trans. Co. v. Shacklett (1886), 19 Ill. App. 145.

3 Lake Shore & M. S. R. R. Co. v. Brown (1887), 123 Ill. 162. *Cf.* Cincinnati etc. R. R. Co. v. Carper (1888), 112 Ind. 26.

4 Lake Shore & M. S. R. R. Co. v. Brown, (1887), 123 Ill. 162.

5 Union Pacific R'y Co. v. Sue (Nebraska, 1889).

§ 996. **Defective appliances for transportatio** While it cannot be said that a carrier by rail *prima facie* chargeable with negligence in all ca unless it can show that its track, cars, machine and other appliances for transportation are the be of the kind and in perfect condition,[1] and while t defendant may, in many cases, show by way of d fense that its appliances were such as are in ge eral use;[2] yet there are cases in which a strong p sumption of negligence arises from the mere fa that the accident occurred.[3] Thus, negligence *prima facie* established by proof that a bridge ga way while a train was crossing it.[4] So, where passenger was injured by the falling of a piece o a porcelain shade from a lamp attached to the to of a car, it was held to be a question for the jury as to whether or not the lamp was in that condition through the company's negligence, and further, that, in the absence of any explanatory circumstance, the mere fact that the shade broke and fell would be sufficient evidence of its defective and unsafe condition to charge the company with negligence.[5] And allegations of negligence have been held to be proven by evidence that the accident resulted from the spreading of the track, caused by defective cross-ties;[6] that it occurred by reason of a defective rail,[7] or a defective brake,[8] or through the absence of protective appliances required by statute.[9] But in a recent case in Pennsylvania, a plaintiff suing for an injury caused by a swinging door, in passing from the defendant's waiting-room to its ferry-boat, was required to prove his allegations of negligence, the door being an ordinary one in plain view, and not a part of the company's machinery

for transportation.[10] And in a New York case, it was held that the plaintiff should have been nonsuited in an action upon an injury received through the falling of a heavy parcel from a rack above his head, the parcel being in no wise extraordinary in appearance, nor likely to attract attention.[11] The presumption of negligence from the occurrence of an accident may be rebutted by showing that it resulted from a latent or secret defect which careful inspection could not have discovered; as, for example, a flaw in the interior of an axletree,[12] or of a wheel,[13] or of a rail.[14] But the knowledge of a switchman of the defective condition of a car is notice to the company.[15]

1 Eureka Springs R'y Co. v. Timmons (Ark. 1889).

2 Kolsti v. Minneapolis etc. R'y Co. 32 Minn. 133.

3 White v. Boston etc. R. R. Co. 144 Mass. 404; Bedford etc. R. R. Co. v. Rainbott, 99 Ind. 551; *Cf. Ingalls v. Bills*, 9 Met. 1; S. C. Thompson on Carriers, 112.

4 Bedford etc. R. R. Co. v. Rainbott, 99 Ind. 551.

5 White v. Boston etc. R. R. Co. 144 Mass. 404.

6 Gulf etc. R'y Co. v. Smith (Texas, 1889).

7 Texas Pacific R'y Co. v. Kirk, 62 Tex. 227.

8 Meister v. Union Pacific R'y Co. 3 Utah, 500; Cramer v. Union Pacific R'y Co. 3 Utah, 504.

9 Muehlhausen v. St. Louis R. R. Co. 91 Mo. 332, under Mo. Acts of 1889, § 4, requiring street-cars to be furnished with gates to prevent passengers getting on or off at the front of the car.

10 Hayman v. Pennsylvania R. R. Co. 118 Pa. St. 508.

11 Morris v. New York Central etc. R. R. Co. 106 N. Y. 678.

12 *Ingalls v. Bills*, 9 Met. 1; S. C. Thompson on Carriers, 112.

13 *Redhead v. Midland R'y Co.* Law R. 4 Q. B. 379; S. C. Thompson on Carriers, 124.

14 Anthony v. Louisville & N. R. R. Co. 27 Fed. Rep. 724.

15 Reed v. Burlington C. R. & N. R'y Co. (1887), 72 Iowa, 166; 2 Am. St. Rep. 243.

§ 997. **The same subject, continued—The passenger's knowledge of the defect.**—Mere knowledge on the passenger's part of defective appliances, when the company allows him to take

passage and pay his fare, does not render him guilty of contributory negligence; for he is justified in assuming that the carrier has used or will use due care under the circumstances, to avoid the danger.[1] But if, with knowledge of the danger, and after being warned by the servants of the company, he persists in entering the car, he is held to assume the risk of injury, to be guilty of contributory negligence, and debarred from any right of recovery.[2]

1 Citizens' St. R'y Co. v. Twiname, 111 Ind. 587.

2 Citizens' St. R'y Co. v. Twiname, 111 Ind. 587. *Cf. Ingalls v. Bills*, 9 Met. 1; S. C. Thompson on Carriers, 112.

§ 998. Injuries arising from directions of the carrier's employees.—A common carrier is answerable in damages for injuries to passengers resulting from the directions or misdirections or fraud of its servants and agents, whilst acting in the line of their employment.[1] A carrier is liable for the acts of the conductor, only in reference to and on his own train.[2] But the private rules of a company, prescribing the duties and powers of employees, must be brought to the knowledge of persons before they can be affected thereby.[3] In an action against a railway company for damages for a wrongful and forcible ejection from a train, to which he had been directed, through mistake, by the company's station agent, a passenger was held entitled to recover for the misdirection, even though the allegation of forcible ejection was not sustained by the evidence.[4] So, an action may be maintained against a railway company by a person, who has been expelled from its train for refusing to pay additional fare after having tendered a punched ticket, purchased by

him from the company's ticket agent upon the false assurance that it was good.[5] And again, where a passenger bought a ticket to a certain point, from a ticket agent of a railway company, and at the direction of the agent boarded a train which did not stop at that point, so that he had to get off at a distance therefrom of several miles, he was held entitled to the actual damages sustained by him in consequence of the agent's mistake.[6] But where the passenger took a wrong train through his own fault, and was informed by the conductor, after the train started, that he could not stop at the point where he wished to go, but, by taking a rear car, could stop at a station beyond, and return to his destination later; and in crossing the platforms of the moving train to reach the rear car, the plaintiff collided with a passenger, and by a sudden but ordinary lurch of the train was thrown from the platform, and injured; it was held that the information given by the conductor was not such a command or direction as to justify the plaintiff in going to the rear car at the risk of the railroad company, and that he could not recover.[7] And where a passenger enters a wrong train through his own mistake, the authority of the conductor terminates when a safe place is provided for alighting, and the passenger voluntarily leaves the train, and if the conductor thereafter gives instructions, acting upon which the passenger meets with an injury, the carrier is not liable.[8]

1 Atchison etc. R. R. Co. v. Gants (1888), 38 Kan. 608; 5 Am. St. Rep. 780.

2 Atchison, Topeka & S. F. R. R. Co. v. Gants (1888), 38 Kan. 608; 5 Am. St. Rep. 780.

3 Lake Shore & Mich. So. R. R. Co. v. Brown (1887), 123 Ill. 162; 5 Am. St. Rep. 510.

4 Alabama G. S. R. R. Co. v. Heddleston, 82 Ala. 218.

5 Murdock v. Boston & Albany R. R. Co. 137 Mass. 293; 50 Am. Rep. 307.

6 Alabama G. S. R. R. Co. v. Heddleston, 82 Ala. 218.

7 Stewart v. Boston etc. R. R. Co. 146 Mass. 605.

8 Cincinnati etc. R. R. Co. v. Carper (1887), 112 Ind. 26; 2 Am. St. Rep. 144.

§ 999. **The same subject, continued.—Contributory negligence.**—The passenger is not guilty of contributory negligence in accepting an invitation or in following the advice or instructions of the company's authorized servants or agents, acting in the line of their employment;[1] unless in so doing he knowingly took a risk which no prudent man under the circumstances would have encountered.[2] Where a passenger occupies a place of peril by the invitation of the carrier's servants, they must exercise a degree of care corresponding to the danger.[3] And although he might have avoided injury by pursuing a different mode of travel, it does not release the carrier's liability, where its servants invited him to ride in a dangerous place.[4] So, a person riding free, and in a baggage-car, with the knowledge of the conductor, is not by reason thereof precluded from recovering for an injury caused by a collision, even though he might not or would not have been injured had he remained in the passenger-car.[5] The passenger has a right to presume that the company's servants would not invite him to ride in a place in which he would be subjected to danger.[6]

1 Cincinnati etc. R'y Co. v. Carper, 112 Ind. 26; 2 Am. St. Rep. 144; Lake Shore etc. R. R. Co. v. Brown, 123 Ill. 162; 5 Am. St. Rep. 510; Louisville, N. A. & C. R. R. Co. v. Wood, (1888) 113 Ind. 544; City R'y Co. v. Lee 50 N. J. 435; 7 Am. St. Rep. 798.

2 Cincinnati etc. R. R. Co. v. Carper, 112 Ind. 26; 2 Am. St. Rep. 144; Lake Shore etc. R. R. Co. v. Brown, 123 Ill. 162; 5 Am. St. Rep. 510.

3 Lake Shore & Mich. So. R. R. Co. v. Brown (1887), 123 Ill. 162; 5 Am. St. Rep. 510.

4 Lake Shore & Mich. So. R. R. Co. v. Brown (1887), 123 Ill. 162; 5 Am. St. Rep. 510.

5 Washburn v. Nashville etc. R. R. Co. 3 Head, 638; 75 Am. Dec. 784.

6 Lake Shore etc. R. R. Co. v. Brown, 123 Ill. 162; 5 Am. St. Rep. 510.

§ 1000. **Warnings of danger.**—It is the carrier's duty to warn its passengers of any unusual or extraordinary danger, and in the absence of warning in such a case, the passenger exercising ordinary prudence is not to be charged with contributory negligence.[1] If, on the other hand, warning of danger was given, it should be allowed due weight as rendering it obligatory upon the passenger to exercise greater care, and in determining the question of his contributory negligence in failing so to do.[2]

1 City R'y Co. v. Lee (1838), 50 N. J. 435; 7 Am. St. Rep. 798; Allen v. Dry Dock etc. R. R. Co. (1889) 2 N. Y. Supl. 738. But see Clune v. Brooklyn etc. R. R. Co. 48 Hun, 618.

2 Missouri Pacific R. R. Co. v. Texas etc. R'y Co. 33 Fed. Rep. 359.

§ 1001. **The carrier's liability for assaults and insults—(a). In general.**—It is the duty of a railway carrier to protect its passengers from the oppression, fraud, malice, insult, or other willful misconduct of its servants,[1] of his fellow-passengers,[2] or of other persons improperly admitted, or improperly allowed to remain, in the car.[3] Thus, a negro, allowed by the company to sit in the same car with whites, is entitled to be protected from violence arising out of race antipathy.[4] And where a passenger, on a railway, in attempting to get off at his destination, is knocked off the car platform by other passengers boarding the train, and injured, no precaution being shown on the part of the

guard to prevent interference between passeng getting on and off, it is a question for the j whether any necessary precaution has been omitt and it is error to direct a nonsuit.[5] So, wher railway company was sued for an injury to a p senger, caused by a mob, who boarded the train attack some laborers, who had been taken on boa at a place not a regular station, and who were ing positions vacated by strikers, the court w held properly to have charged the jury that it w the company's duty to exercise the utmost ca skill, and vigilance to carry plaintiff safely, and protect him against all danger, from whatev source arising, so far as the same could, by the ex ercise of such a degree of care and vigilance, hav been reasonably foreseen and prevented.[6] In li manner, a railway company has been held liable for an injury to a woman occurring by reason of a fight between riotous passengers, who intruded themselves into the car set apart for women.[7]

1 Louisville & N. R. R. Co. v. Ballard (1887), 85 Ky. 307; 7 Am. St. Rep. 600; Louisville, N. A. & C. R. R. Co. v. Wood (1888), 113 Ind. 544; *Crater v. Chicago etc. R'y Co.* 36 Wis. 657; 17 Am. Rep. 504.

2 St. Louis, A. & T. R'y Co. v. Mackie (1838), 71 Tex. 491; Britton v. Atlanta etc. R. R. Co. 88 N. C. 536; 43 Am. Rep. 749; *Pittsburg, Fort Wayne and Chicago R'y Co. v. Hinds* (1866), 53 Pa. St. 512; S. C. Thompson on Carriers, 295.

3 Philadelphia etc. R. R. Co. v. Derby, 14 How. 468; Nieto v. Clark, 1 Cliff. 145; Chamberlain v. Chandler, 4 Massey, 212; Brand v. Railway Co. 8 Barb. 368; Weed v. Panama R. R. Co. 17 N. Y. 362; Goddard v. Grand Trunk R'y Co. 57 Me. 202; 2 Am. Rep. 39; Baltimore etc. R. R. Co. v. Blocher, 27 Md. 277; Flint v. Norwich & N. Y. Transp. Co. 34 Conn. 554; Seymour v. Greenwood, 7 Hurl. & N. 355; Landreau v. Bell, 5 La. (O. S.) 434; Day v. Owen, 5 Mich. 520; Atlantic etc. R. R. Co. v. Dunn, 19 Ohio St. 162; 2 Am. Rep. 382; Jefferson R. R. Co. v. Rogers, 38 Ind. 116; 10 Am. Rep. 103; Stephen v. Smith, 29 Vt. 190; Bayley v. Railway Co. Law R. 7 Com. P. 415; New Orleans R. R. Co. v. Burke, 53 Miss. 200; Pittsburg R. R. Co. v. Pillow, 76 Pa. St. 510; 18 Am. Rep. 424; Railroad Co. v. Finney, 10 Wis. 388; Moore v. Railroad Co. 4 Gray, 465; Shirley v. Billings, 8 Bush, 147; 8 Am. Rep. 451; Bryant v. Rich, 106 Mass. 180; 8 Am. Rep. 311; Duggins v. Watson, 15 Ark. 118; Passenger R. R. Co. v. Young, 21 Ohio St. 518; 8 Am. Rep. 78.

4 *Britton v. Atlanta etc. R. R. Co.* 88 N. C. 536; 43 Am. Rep. 749.

5 Buck v. Manhattan R'y Co. (1888) N. Y. Ct. of Com. Pleas, 19 N. Y. Rep. 908.
6 Chicago & Alton R. R. Co. v. Pillsbury, 123 Ill. 9; 5 Am. St. Rep. 483.
7 *Pittsburg and Ft. W. R. R. Co. v. Hinds*, 53 Pa. St. 503.

§ **1002.** (*b*). **By servants of the carrier.—Scope of employment.**—In an action against a carrier for the tort of its servant, the plaintiff need not show that the act complained of was specifically authorized by the company, nor that it was *within* the scope of his employment.[1] It is sufficient to render the company responsible, that the tort was committed *while* the servant was acting in the line of his employment, although in committing the act complained of he thereby exceeded his authority, and acted maliciously,[2] and against orders.[3] This is well illustrated by a case in Wisconsin, where the plaintiff was allowed to recover for mental suffering caused by a servant of the company kissing her while he was acting in his employment as conductor of the train. The company plead that it had not authorized the act, and that in kissing the plaintiff, the conductor went beyond the general scope of his employment; but the court held the defendant to be liable under the rule as stated above.[4] The scope of the servant's authority is frequently brought in question in suits against railway companies for the unnecessary violence of its employees in ejecting persons from trains. In such cases, to show the extent of the conductor's authority, it need not be proven that he was specifically empowered to eject persons from his train, when it appears that he had general authority to receive or reject persons applying for passage.[5] Whether the expulsion of passengers is within the general scope

of a brakeman's duty, however, is more difficult to determine. It would seem to depend upon the custom of the road, and this may be established by evidence that other brakemen had ejected persons who refused to pay their fare.[6] To show that the person committing the tort was a servant of the company, evidence of his deporting himself in that capacity on the train, and acting as such between certain points on the road, is sufficient.[7] But it is not sufficient proof of his being a servant of the company that he wore a cap with a badge, and carried a lantern with the company's initials upon it.[8] And in the case last cited, where the passenger when about to take the train had been assaulted and robbed by an unknown person, it was held that even upon the hypothesis that the tort was committed by a servant of the company, it could not be held responsible for an act wholly disconnected from any service in which any of its employees were engaged.[9]

1 Louisville N. A. & C. R. R. Co. v. Wood (1888), 113 Ind. 544; *Craker v. Chicago etc. R'y Co.* 33 Wis. 657; 17 Am. Rep. 594; Travers v. Kansas Pacific R. R. Co. 63 Mo. 421; St. Louis, I. M. & S. R'y Co. v. Hendricks, 43 Ark. 177; 3 Am. St. Rep. 220; Lake Shore & M. S. R. R. Co. v. Brown, (1837), 123 Ill. 162; 5 Am. St. Rep. 511; *Pendleton v. Kinsley* (1871), 3 Cliff. 416; S. C. Thompson on Carriers, 352.

2 Cagney v. Manhattan R'y Co. (1888), 2 N. Y. Supl. 410; and cases cited in preceding note.

3 *Philadelphia and Reading R. R. Co. v. Derby* (1832), 14 How. 463; S. C. Thompson on Carriers, 31.

4 *Craker v. Chicago etc. R'y Co.* 33 Wis. 657; 17 Am. Rep. 594.

5 Travers v. Kansas Pacific R. R. Co. 63 Mo. 421.

6 St. Louis, I. M. & S. R'y Co. v. Hendricks, 43 Ark. 177; 3 Am. St. Rep. 220.

7 St. Louis I. M. & S. R'y Co. v. Hendricks; 43 Ark. 177; 3 Am. St. Rep. 220.

8 Sachrowitz v. Atchison, T. & S. F. R. R. Co. (1887) 37 Kan. 212.

9 Sachrowitz v. Atchison, T. & S. F. R. R. Co. (1887) 37 Kan. 212.

§ 1003. (*c.*) **The carrier's peculiar obligation female passengers.**—Toward its female passen-

gers the carrier owes a peculiar diligence, to preserve them from obscenity, immodest conduct or wanton approach.[1] And an instruction in such case that, if defendant's employees "were insulting, either in words, tone, or manner," to the plaintiff, the jury should award damages, is not erroneous on account of the use of the word "tone."[2] But it will not be liable for such conduct of its employees in the presence of female passengers as can only be denominated "indecorous,"[3] nor for the disorderly and disgraceful conduct of persons intruding upon its stations, when it had no reason to anticipate such proceedings.[4]

1 Louisville & N. R. R. Co. v. Ballard (1887), 85 Ky. 307; *Craker v. Chicago etc. R'y Co.* 36 Wis. 657; 17 Am. Rep. 504.

2 Louisville & N. R. R. Co. v. Ballard (1887), 85 Ky. 307.

3 Louisville & N. R. R. Co. v. Ballard (1887), 85 Ky. 307.

4 Battou v. South & N. A. R. R. Co. 77 Ala. 591; 54 Am. Rep. 514.

§ 1004. (*d*). **The conductor's duty and authority in the premises.**—The carrier's duty of protecting its passengers devolves upon the conductor of the train, who, upon occasions of danger, may exercise the functions of a civil officer.[1] In the case last cited, the court said that the conductor "should have stopped the train, and hewed a passage through the intrusive mass until he had expelled the rioters, or had demonstrated, by an earnest experiment, that the undertaking was impossible."[2] In such cases, where it is necessary for the conductor to use deadly weapons, the company is not liable for the consequences to a disorderly person, wounded in the conflict.[3]

1 *Pittsburg, Fort Wayne and Chicago R'y Co. v. Hinds*, 53 Pa. St. 512; S. C. Thompson on Carriers, 295.

2 *Pittsburg, Fort Wayne and Chicago R'y Co. v. Hinds*, 53 Pa. St. 503.

3 Peavy v. Georgia R. R. Co. (Ga. 1889).

§ 1005. (e.) **Exemplary damages for failure to protect.**—When the company has been found to have neglected its duty to protect its passengers from the misconduct of its servants, exemplary damages may be awarded.[1] And such damages may be awarded for an assault by a fellow-passenger also when the party assaulted called upon the conductor for assistance, and he refused to interfere.[2]

1 Louisville & N. R. R. Co. v. Ballard (1887), 85 Ky. 307; Cagney v. Manhattan R'y Co. (1888), 2 N. Y. Supl. 410.

2 Flannery v. Baltimore & O. R. R. Co. 4 Mackey (D. C.) 111.

§ 1006. **Connecting carriers.—Through tickets.**—There are several English cases holding that a company selling a through ticket to a point beyond its terminus, is liable for any injury to the passenger, whether occurring on its own road or that of the connecting carrier.[1] This would seem to be the rule in Wisconsin, also.[2] And in New Jersey it is held that a railway company cannot avoid its duty safely to transport a passenger over the entire route for which it has sold him a ticket, by alleging contracts and arrangements made with connecting lines, of which no notice was given to the passenger.[3] But it is generally held in America that the initial carrier is liable only for injuries sustained by the passenger while upon its own line.[4] This would seem to be upon the theory that the company selling the through ticket acts merely as the agent of the connecting carrier.[5] So, where a contract was made between a railway company and an omnibus driver, by which the latter agreed to convey passengers from the station on tickets sold by the company, it was held that a passenger could not recover from the company for an injury

induced by the negligence of the driver.[6] But where the defendant issued excursion tickets to a point on a connecting line, and by contract between the two roads the train was to be taken over the latter by its engine and in charge of its servants, it was decided that they were *pro hac vice* the employees of the company issuing the tickets, and that the defendant was liable for their negligence.[7]

1 Gt. Western R'y Co. v. Blake, 7 Hurl. & N. 987; Bristol & Exeter R'y Co. v. Collins, 7 H. L. Cas. 194; Buxton v. North Eastern R'y Co. Law R. 3 Q. B. 549.

2 *Candee v. Pennsylvania R. R. Co.* 21 Wis. 582; S. C. Thompson on Carriers, 419.

3 Little v. Dusenbury, 46 N. J. 614.

4 Louisville etc. R. R. Co. v. Weaver, 9 Lea, 38; 42 Am. Rep. 654; Poole v. Delaware etc. R. R. Co. 35 Hun (N. Y.) 29; Nashville etc. R. R. Co. v. Sprayberry, 8 Baxt. (Tenn.) 341; 35 Am. Rep. 705; Sprague v. Smith, 29 Vt. 421; Knight v. Portland etc. R. R. Co. 56 Me. 234. See, however, *Quimby v. Vanderbilt*, 17 N. Y. 306, S. C. Thompson on Carriers, 423, where the liability was said to depend in each case upon the nature of the contract between the parties.

5 Pennsylvania R. R. Co. v. Connell, 112 Ill. 295. *Cf.* Young v. Pennsylvania R. R. Co. 11 East. Rep. 717; Bethea v. Northeastern R. R. Co. 26 S. C. 91; Mosher v. St. Louis etc. R'y Co. 127 U. S. 390.

6 Poole v. Delaware, Lackawanna etc. R. R. Co. 35 Hun, 29.

7 Washington v. Raleigh etc. R. R. Co. 101 N. C. 239.

§ 1007. **Sleeping and parlor cars.**—Companies owning and operating sleeping-cars are common carriers of passengers, and are liable as such; and this is true, although the main compensation paid for transportation be received by the railway company, and not by the sleeping-car company.[1] The railway company also, is liable for the negligence of the sleeping-car company.[2] The porter and other employees of the latter are considered to be the servants of the railway, and their negligence is imputed to it.[3] For the railway company cannot exonerate itself from its public duty to carry safely,

by substituting the care and diligence of another company for its own.[4] In New York, where the rule prevails that a person traveling upon a free pass is bound by stipulations therein against liability on the part of the railway company, it has been contended that if he purchase accommodations in a parlor or sleeping car, he thereby becomes a passenger for hire, and may hold the railway company liable for injuries resulting from its negligence.[5] But while this view of the case was sustained in the court of common pleas, it was reversed by the appellate court, and the rule in all its severity enforced against the passenger.[6] But neither company is to be held liable for a wrongful ejectment of a passenger from the cars of the other by the other's servants or officers.[7] Railway and sleeping-car companies may lawfully contract that accommodations shall be afforded by the latter only to passengers having through tickets; and if, in accordance with such a contract, the officers of a sleeping-car refuse the application of a passenger not having a through ticket, and expel him from a car, their company is not to be held liable, no undue force having been used.[8]

1 Pullman Palace Car Co. v. Pollock (1887), 69 Tex. 120; 5 Am. St. Rep. 31.

2 Pennsylvania R. R. Co. v. Roy, 102 U. S. 451; Columbus etc. R. R. Co. v. Walrath, 33 Ohio St. 461.

3 Williams v. Pullman Palace Car Co. 40 La. An. 87.

4 Columbus etc. R. R. Co. v. Walrath, 33 Ohio St. 461. But see Thorpe v. Railroad Co. 76 N. Y. 402, 32 Am. Dec. 325, and Kinsley v. Railroad Co. 125 Mass. 54, 28 Am. Rep. 200, where the *ratio decidendi* was want of knowledge on the plaintiff's part that the parlor or sleeping cars were controlled by a company other than the railway company.

5 Ulrick v. New York Central R. R. Co. 81 Alb. Law J. 302, where the court said, "We know nothing of the arrangement between the defendant and the Wagner Car Company, but as no one without leave of the defendant can run cars upon its track, we must assume that the drawing-room cars are run for the benefit of the defendant." *Cf.* Thorpe v. N. Y. Central R. R. Co. 76 N. Y. 409; 32 Am. Rep. 325.

6 Ulrich v. New York Central etc. R. R. Co. (1886), 108 N. Y. 80; 2 Am. St. Rep. 369.
7 Paddock v. Atchison etc. R. R. Co. 37 Fed. Rep. 841.
8 Lawrence v. Pullman Palace Car Co. 114 Mass. 1.

§ 1008. Effect of consolidation, lease and running privileges.—A railway company cannot evade its public duties and liabilities by surrendering its road and franchises without legislative authority.[1] And where a railroad is owned by one company and leased to another without authority, both are liable for wrongful injury by lessee.[2] But an authorized lease absolves the lessor from the torts of its lessee,[3] the latter having full control of the road.[4] A railway company is liable for the negligence of the employees and agents of another road which it has projected and constructed, and which it controls and manages for the purpose of a local line.[5] But it is not liable for negligence on the part of those operating a road which it merely aids, as stockholder or bondholder, or as guarantor of bonds.[6] When one company has running privileges over the road of another, and, under the arrangement between them, the conductor and trainhands of the former are subject to the rules and regulations of the latter, a passenger, purchasing his ticket from the company owning the road, cannot hold the former liable for injuries sustained by him on that part of the journey.[7] Where an ineffectual attempt at consolidation has been made, in consequence of which the road of one company is being operated by another, and through the negligence of the latter a passenger is injured, the former company will be held liable.[8] An assumption by a consolidated corporation of the debts and lia-

bilities of the several companies forming the consolidation, makes it responsible for damages incurred through the negligence of those companies.

1 Naglee v. Alexandria & F. R'y Co. (1887), 83 Va. 707; 5 Am. St. Rep. 308; Chollette v. Omaha etc. R. R. Co. (1889) 37 Am. & Eng. R. R. Cas. 1. *Vide supra*, § 569.

2 International & Great N. R. R. Co. v. Dunham (1887), 68 Tex. 231; 4 Am. St. Rep. 484; and cases cited, *supra*, § 570.

3 Nugent v. Boston, C. & M. R. R. Co. (1838), 80 Me. 62; 6 Am. St. Rep. 151, and cases cited *supra*, § 569.

4 St. Louis etc. R. R. Co. v. Balsley, 18 Mo. App. 79.

5 Atchison etc. R. R. Co. v. Davis, 34 Kan. 209.

6 Atchison etc. R. R. Co. v. Davis, 34 Kan. 239.

7 Smith v. St. Louis etc. R'y Co. 85 Mo. 418; 55 Am. Rep. 339. *Cf. Great Western R'y Co. v. Blake*, 7 Hurl. & N. 937; S. C. Thompson on Carriers, 403; *McElroy v. Nashua and Lowell R. R. Co.* 4 Cush. 400; S. C. Thompson on Carriers, 409.

8 Latham v. Boston, H. I. etc. R'y Co. 33 Hun, 265.

9 St. Louis & S. F. R'y Co. v. Marker, 41 Ark. 542.

§ 1009. **Measure of damages.**—In determining the amount of damages to be awarded in cases of injury to persons, not resulting in death, it is proper for the jury to consider the expenses incurred by the plaintiff for medical attendance and other items of expense, necessarily incident to the sickness produced by the injury,[1] and his impaired ability thenceforth to engage in remunerative labor and to follow his trade or profession.[2] The permanency of the injuries is an important factor in increasing the amount of damages to be allowed.[3] In a late case in point, where the plaintiff's hand was severely cut, and it was in evidence that he was sick from his injuries for several months, and was finally compelled to have his arm amputated just below the elbow, and that his expenses therefor were nearly two thousand dollars; that his salary as a telegraph manager was one hundred and forty-

four dollars per month, and, being an expert operator, he occasionally made fifty dollars per month, extra; and that his value and usefulness as an operator had been impaired to the extent of one-half, it was held that a verdict for twelve thousand dollars was not excessive, though the nature of the case only allowed compensatory damages.[4] The nature of the plaintiff's business or vocation, accordingly, is important in estimating damages. But it is inadmissible, for the purpose of diminishing the amount, to show that the person injured was engaged in an illegal traffic, such as keeping a house of prostitution.[5] Pecuniary losses are not the only elements of damage. The pain resulting from the injury, the suffering incident to being fastened for a long time in the wreck of the train, and the mental anguish endured, should be considered.[6] But damages for mental suffering must be based upon physical, or upon malice, insult, or oppression.[7] Exemplary damages may be imposed where the company's servants showed reckless disregard of consequences,[8] or where the injury was accompanied by insult or was inflicted maliciously.[9] In an action for negligence, the jury must take into consideration the circumstances as to aggravation and mitigation.[10] But failure to instruct as to circumstances, aggravating or mitigating, is not an error when no such circumstances exist.[11] The jury are not to base their estimate of the amount of damages upon injuries of which the defendant's negligence was not the proximate cause.[12] But the mere fact that the plaintiff, finding relief from his sufferings in moving about, could not be kept in bed, although perfect quiet would have furthered

his recovery, is not sufficient to show negligence his part in the care of his case, without evide that he knew that his conduct was injurious, that he acted contrary to his physician's advice.[1]

1 Dougherty v. Missouri R. R. Co. (1888), 91 Mo. 647.

2 Dougherty v. Missouri R. R. Co. (1888), 91 Mo. 647. *Cf. Redhe Holland Ry Co.* (1886) Law R. 4 Q. B. 379; S. C. Thompson on Carr 124; *Ingalls v. Bills* (1845), 9 Met. 1; S. C. Thompson on Carriers, 112.

3 Reichman v. Second Ave. R. R. Co. 48 Hun, 620; *Curtis v. Rochester R. R. Co.* 18 N. Y. 534; S. C. Thompson on Carriers, 148.

4 Dougherty v. Missouri R. R. Co. (1888) 91 Mo. 647.

5 Indianapolis etc. R'y Co. v. Bush, 101 Ind. 582.

6 Quinn v. Long Island R. R. Co. 34 Hun, 331.

7 Porrah v. Illinois Central R. R. Co. (1887) 65 Miss. 14; 7 Am. St. Rep. 638; Johnson v. Wells Fargo etc. Co. 6 Mo. 224; 3 Am. Rep. 245; Wyman v. Leavitt, 71 Me. 227; 36 Am. Rep. 303; Bovee v. Danville, 53 Vt. 183; Canning v. Williamstown, 1 Cush. 451; Trigg v. St. Louis etc. R. R. Co. 74 Mo. 147; 41 Am. Rep. 305.

8 Louisville & N. R. R. Co. v. Ballard (1888), 85 Ky. 307; 7 Am. St. Rep. 600.

9 *Porrah v. Illinois Central R. R. Co.* 65 Miss. 14; 7 Am. St. Rep. 638; Chicago etc. R. R. Co. v. Scurr, 59 Miss. 456; 42 Am. Rep. 733; Vicksburg etc. R. R. Co. v. Scanlon, 63 Miss. 413.

10 Smith v. Wabash, St. L. & P. R'y Co. (1887) 92 Mo. 359; 1 Am. St. Rep. 729.

11 Smith v. Wabash, St. L. & P. R'y Co. (1887) 91 Mo. 359; 1 Am. St. Rep. 729.

12 Galveston etc. R'y Co. v. Cooper, 70 Tex. 67; Gulf etc. R'y Co. v. Mannewitz, 70 Tex. 73.

13 Gulf etc. R'y Co. v. Mannewitz, 70 Tex. 73.

§ 1010. Injuries resulting in death.—A civil suit to recover damages for injuries resulting in death could not be maintained at common law, for *actio personalis moritur cum persona*.[1] But in England and in many of the American States, this defect in the common law has been remedied by statute.[2] The English statute, commonly known as Lord Campbell's Act, does not transfer the right of action of the person injured to his representatives, but was enacted to provide compensation to the family of the person killed,[3] making the injury resulting to those having an actual pe-

iniary interest in his life the sole ground of recovery.[4] Accordingly, in England, and in those of he American States whose statutes are similar to ord Campbell's Act, it is immaterial whether leath were caused instantaneously or whether the leceased survived his injuries long enough for a right of action to vest in him.[5] But under the Massachusetts statute it is the right of action of the party himself that survives his death; and, if the injury resulted in instantaneous death, before any right of action vested in him, none accrues to his heirs.[6] And the same is held to be the effect of statutes resembling the Massachusetts act.[7] Accordingly, in those States where the death was immediate, the family of the deceased would be without remedy but for other statutes under which the party causing the death may be pursued by indictment and punished by fine, the proceeds of which are distributed among the relatives.[8]

1 The Harrisburg, 119 U. S. 199; Insurance Co. v. Brame, 95 U. S. 754; Eden v. Lexington etc. R. R. Co. 14 Mon. B. 204; Whitford v. Panama R. R. Co. 23 N. Y. 465.

2 Chicago etc. R. R. Co. v. Schroeder, 18 Ill. App. 328; Lawson v. Chicago etc. R'y Co. 64 Wis. 447; Shrier v. Milwaukee etc. R'y Co. 65 Wis. 457; Tex. Const. (1876) Art. XVI, § 26; Pa. Const. (1874) Art. III, § 21; Ark. Const. (1874) Art. V, § 32.

3 Blake v. Midland R'y Co. 18 Q. B. 93.

4 Duckworth v. Johnson, 4 Hurl. & N. 653; Boulter v. Webster, 13 Week. R. 289; S. C. 11 Law T. N. S. 598; Pym v. Great Northern R'y Co. 2 Best & Smith, 759; S. C. 4 Best & Smith, 396.

5 Safford v. Drew, 3 Duer, 627; Brown v. Buffalo etc. R. R. Co. 22 N. Y. 191; Cooley on Torts, *271; 2 Thompson on Negligence, § 90, and English cases cited *supra*.

6 Mulchahey v. Washburn Car Wheel Co. 145 Mass. 281; Riley v. Connecticut River R. R. Co. 135 Mass. 292; Hollenbeck v. Berkshire R. R. Co. 9 Cush. 478; Bancroft v. Boston etc. R. R. Co. 11 Allen, 34.

7 State v. Maine Central R. R. Co. 60 Me. 490; State v. Grand Trunk R'y Co. 61 Me. 114.

8 Commonwealth v. Metropolitan R. R. Co. 107 Mass. 236; State v. Grand Trunk R'y Co. 61 Me. 114; State v. Maine Central R. R. Co. 60 Me. 490.

PART V.

GOVERNMENTAL REGULATION.

CHAPTER XXXIX.

COMMERCE AMONG THE STATES.

§ 1011. Federal regulation of interstate commerce.
§ 1012. The power in Congress to regulate.
§ 1013. The exclusive nature of federal control.
§ 1014. The extent of the federal power.
§ 1015. Its applicability to transportation by water.
§ 1016. The extent of the power to regulate which remains in the several States.
§ 1017. State regulation by taxation.
§ 1018. The extent of the power to tax.
§ 1019. State regulation under the police power.
§ 1020. The interstate commerce legislation— The present law.
§ 1021. Its constitutionality.

§ 1011. **Federal regulation of interstate commerce.**—One of the principal inducements which led to the formation of the federal constitution was the necessity of the freedom of interstate commerce, and of the removal of all obstructions to and burdens upon traffic. "In addition," said Mr. Hamilton in the *Federalist*, "to the defects of the existing federal system, * * * there are others of not less importance, which concur in rendering that system altogether unfit for the administration of the affairs of the union. The want of a power to regulate commerce, is by all parties allowed to be of the number. * * * It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade

or finance, that more strongly demands a fe superintendence. The want of it has alread erated as a bar to the formation of beneficial t ies with foreign powers; and has given occasio dissatisfaction between the States."[1] This wa complished by conferring upon the Congress, an other powers expressly granted to it, the p "to regulate commerce with foreign nations, among the several States, and with the In tribes;[2]" and to make all laws which shall be ne sary and proper for carrying into execution foregoing powers, and all other powers vested this constitution in the government of the Un States, or in any department or officer thereof. The grant is as extensive as the mischief, and co prehends all foreign commerce and all commer among the States.[4]

1 The Federalist, No. XXII, by Hamilton. And see Brown v. Maryland, 12 Wheat. 419.

2 Const. Art. I, § 8, cl. 3.

3 Const. Art. I, § 8, cl. 18.

4 Brown v. Maryland, 12 Wheat. 419, 446, per MARSHALL, C. J.

§ 1012. The power in Congress to regulate.— The right of intercourse between State and State derives its source from those laws whose authority is acknowledged by civilized man throughout the world. The constitution found it an existing right, and gave to Congress the power to regulate it.[1] The "power to regulate" is to prescribe the rule by which the commerce is to be governed.[2] Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.[3] The design and object of that power, as evinced

n the history of the constitution, was to establish perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies, or local and partial interests, might be disposed to introduce and maintain.[4] The power having been granted to Congress by the several States, by their action in adopting the constitution, it was held in an early case that it was the same power to regulate commerce which previously existed in the States;[5] and that the general government, in regulating commerce with foreign nations and among the States, may use means that may also be employed by a State in the exercise of its acknowledged powers.[6] The power thus conferred upon Congress is not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but is applied to the new agencies and instruments of commerce which have been discovered or invented since that time, and to the later conditions of business and of social requirements. It was intended for the government of the business to which it relates, at all times and under all circumstances; and it is not only the right, but the duty, of Congress to take care that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State legislation.[7] The constitutional provision covers property which is transported as an article of commerce from foreign countries, or among the States, from hostile or interfering State legislation, until it has mingled with and become a part of the general property of the country, and protects it even after it has en-

tered a State from any burdens imposed by reason of its foreign origin.[8] The power to regulate commerce is to prescribe the rule by which the commerce is to be governed. Like all other powers vested in Congress, it is complete in itself, and may be exercised to its utmost extent. It has no limitations beyond those prescribed in the constitution itself. The power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having the same restrictions on its exercise as are found in the constitution of the United States.[9]

1 Gibbons v. Ogden, 9 Wheat. 211.

2 Gibbons v. Ogden, 9 Wheat. 1, 197, MARSHALL, C. J.

3 The Daniel Ball, 10 Wall. 557, 565; Coe v. Errol, 116 U. S. 517; Pacific etc. Co. v. Railroad Commissioners, 9 Sawy. 253; 18 Fed. Rep. 1; Hardy v. Railroad Co. 32 Kan. 698, 717.

4 Veazie v. Moor, 14 How. 568, 574; The Federalist, Nos. 7, 11; Gibbons v. Ogden, 9 Wheat. 1, 224 *et seq.*; Mobile v. Kimball, 102 U. S. 691; Welton v. Missouri, 91 U. S. 275.

5 Gibbons v. Ogden, 9 Wheat. 227.

6 Gibbons v. Ogden, 9 Wheat. 204.

7 Pensacola Telegraph Co. v. Western Union Telegraph Co. 96 U. S. 1, 9, WAITE, C. J.; Telegraph Co. v. Texas, 105 U. S. 460.

8 Welton v. Missouri, 91 U. S. 275.

9 Gibbons v. Ogden, 9 Wheat. 197.

§ 1013. The exclusive nature of federal control.—Commerce with foreign countries and among the States consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. To regulate it, there must be only one system of rules applicable alike to the whole country, which Congress alone can prescribe.[1] As to matters which are in their nature national, or admit of a

uniform system or plan of regulation, the power to regulate is exclusively vested in Congress.[2] The power of Congress to regulate commerce was not intended to interfere with private contracts, nor designed to create impediments to free commercial intercourse.[3] The word "among," as found in the constitutional provision, is not used in the restricted sense of "between," but rather as meaning "intermingled with."[4] Commerce among the several States may be introduced into the interior of a State; it does not stop at its boundary line.[5] Transportation of goods under one contract and by one voyage is "commerce among the States," even as to the part of the voyage lying wholly within one State,[6] and is subject to the exclusive control of Congress under the constitution.[7] Freight carried from a point without a State to a point within it, as the end of its voyage, and freight carried from some point within that State to other States, is as much commerce among the States as that which passes entirely through the State from its point of original shipment to its destination.[8] There may be transportation of goods begun and ended within the limits of a State, and unconnected with carriage outside of the State, which is not "commerce among the States."[9] Such transportation remains subject to regulation by the State.[10] Commerce between points in the same State, but which, in being carried from one place to the other, passes through another State, is Interstate Commerce, and subject to regulation by the provisions of the Act to Regulate Commerce.[11] The phrase does not comprehend that commerce which is completely internal, which is carried on between man and man in a

State, or between parts of the same State, and which does not extend to or affect other States. It may very properly be restricted to that commerce which concerns more States than one.[12] The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does not in any respect affect the character of the transaction. To the extent which each agency acts in that transportation, it is subject to the regulation of commerce.[13] The power of Congress extends not only to goods moving from State to State and the traffic in them,[14] but also to the instruments and persons transporting them.[15]

1 County of Mobile v. Kimball, 102 U. S. 691; and see Chy Lung v. Freeman, 92 U. S. 275; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Wabash etc. R'y Co. v. Illinois, 118 U. S. 557; Pacific etc Co. v. Railroad Comm'rs, 9 Sawyer, 253; 18 Fed. Rep. 10; Case of State Freight Tax, 15 Wall. 232; Hall v. De Cuir, 95 U. S. 485; Pickard v. Pullman P. C. Co. 117 U. S. 34.

2 Henderson v. Mayor, 92 U. S. 260; County of Mobile v. Kimball, 102 U. S. 632; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Wabash etc. R'y Co. v. Illinois, 118 U. S. 557; Case of the State Freight Tax, 15 Wall. 232.

3 Railroad Co. v. Richmond, 19 Wall. 584.

4 Gibbons v. Ogden, 9 Wheat. 194.

5 Gibbons v. Ogden, *supra;* Brown v. Maryland, 12 Wheat. 446; U. S. v. Coombs, 12 Pet. 72; Wabash, St. L. & Pac. R'y Co. v. Illinois, 118 U. S. 557.

6 Wabash, St. L. & P. R'y Co. v. Illinois, 118 U. S. 557; Carton v. Illinois Cent. R. R. Co. 59 Iowa, 148; Hardy v. Atchison, T. & S. F. R. R. Co. 32 Kans. 698.

7 *Ibid.*

8 Fargo v. Michigan, 121 U. S. 230; Ex parte Koehler, 30 Fed. Rep. 867.

9 Wabash, St. L. & P. R'y Co. v. Illinois, 118 U. S. 557.

10 *Ibid;* Louisville & N. R. R. Co. v. Railroad Comm'rs of Tenn. 19 Fed. Rep. 673; Railroad Comm'rs v. Railroad Co. 2 S. Car. 220; S. C. 26 Am. & Eng. R. Cas. 29; Mobile etc. R. R. Co. v. Sessions, 28 Fed. Rep. 592; Illinois Cent. R. R. Co. v. Stone, 20 Fed. Rep. 468.

11 New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R'y Co. 2 Inter. Com. C. 375.

Gibbons v. Ogden, 9 Wheat. 194.

Coe v. Errol, 116 U. S. 517; The Daniel Ball, 10 Wall. 557, 565.

14 Brown v. Maryland, 12 Wheat. 419; Cook v. Pennsylvania, 97 U. S. 566; Welton v. Missouri, 91 U. S. 275; Webber v. Virginia, 103 U. S. 344; Walling v. Michigan, 116 U. S. 446; Railroad Co. v. Husen, 95 U. S. 465.

15 Gibbons v. Ogden, 9 Wheat. 1; The Daniel Ball, 10 Wall. 557; Henderson v. Mayor, 92 U. S. 259; Case of State Freight Tax, 15 Wall. 232; Telegraph Co. v. Texas, 105 U. S. 460; Pickard v. Pullman Palace Car Co. 117 U. S. 34; Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727; Sherlock v. Alling, 93 U. S. 99; Pacific etc. Co. v. Railroad Commissioners, 9 Sawy. 253.

§ 1014. The extent of the federal power.—In construing the commercial clause of the constitution, the courts have applied the rule that a specific grant includes all such powers as are necessarily incident to the power granted or requisite to a complete enjoyment of it. Accordingly, it has been adjudged that Congress has authority to construct, or authorize individuals or corporations to construct, railroads across the States and Territories of the United States;[1] that Congress may enact laws punishing theft of goods while they constitute a part of the commerce under its control;[2] that the act of Congress of 1850, providing for the effect of recording conveyances of vessels, was constitutional;[3] that Congress may declare bridges over navigable rivers lawful structures,[4] and require the alteration of a bridge, without incurring any liability to the bridge company;[5] that it may prescribe the charges for use of a bridge over a navigable stream;[6] that Congress may close one of several channels in a navigable stream.[7] It is well established that telegraph lines are instruments of commerce, and that in so far as they are engaged in commerce between the States they are subject to the control of Congress.[8] A State statute requiring the delivery of despatches by messenger, when the persons to whom they are addressed reside within one mile of the telegraph station, or within

the city or town where a station is situated, was declared void in so far as it attempted to regulate such deliveries in other States.[9]

1 California v. Pacific Railroad Co. 127 U. S. 1.

2 U. S. v. Coombs, 12 Pet. 72; Coe v. Errol, 116 U. S. 517.

3 White's Bank v. Smith, 7 Wall. 646. See The Lottawanna, 21 Wall. 558.

4 The Wheeling Bridge, 18 How. 429; The Clinton Bridge, 10 Wall. 454; Miller v. City of N. Y. 10 Fed. Rep. 513; affirmed, 109 U. S. 385.

5 Bridge Co. v. U. S. 105 U. S. 470.

6 Canada S. R'y Co. v. Bridge Co. 8 Fed. Rep. 190.

7 South Carolina v. Georgia, 93 U. S. 4.

8 Pensacola Tel. Co. v. Western U. Tel. Co. 99 U. S. 1; Telegraph Co. v. Texas, 105 U. S. 460; Western U. Tel. Co. v. Pendleton, 122 U. S. 347; Ratterman v. Western U. Tel. Co. 127 U. S. 411; Leloup v. Port of Mobile, 127 U. S. 640; Western U. Tel. Co. v. New York, 38 Fed. Rep. 552.

9 Western U. Tel. Co. v. Pendleton, 122 U. S. 347.

§ 1015. Its applicability to transportation by water.—The power of Congress over commerce among the States under the clause now being considered, being exclusive, all State laws which interfere with or obstruct it are held void as being in conflict with the provision. So it has been declared that a State statute intended to regulate, or to tax, or to impose any other restrictions upon the transmission of persons or property or telegraphic messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress.[1] A State law requiring an importer to take and pay for a license before he should be permitted to sell a package of imported goods is unconstitutional.[2] A statute requiring auctioneers to collect and pay a tax on sales, when applied to imported goods by him sold for the importer, was, in like manner, held void.[3] All State laws intended to regulate, or calculated to obstruct commerce upon

ıvigable rivers or along the coast have uniformly ıen adjudged to be invalid. Included among ıem are: a statute granting the exclusive right to avigate waters within a State for a term of years;[4] n act authorizing a bridge across the Ohio river, he bridge being found to be a nuisance and its batement decreed.[5] The Kentucky and Indiana Bridge Company has the chartered powers of a ;ommon carrier, and is such *de facto*. It is, there- fore, under the Act to Regulate Commerce entitled to demand of railroad companies whose lines are interse ted by its tracks, the same reasonable, proper, and equal facilities for the interchange of traffic and for the receiving, forwarding, and delivering of property that may lawfully be demanded by other carriers under that act.[6] The fact that statutory regulations of internal commerce are such as to preclude the literal enforcement of pre-existing contracts, does not affect the validity of such laws or make them in a constitutional sense laws impairing the obligation of contracts.[7] Such a consequence is often a necessary result of any considerable change in the general laws, as in the following instances: a statute requiring the owners of steamboats to make a statement of their residence, interest, etc., under penalty of a fine;[8] a statute requiring payment to port-wardens of a fee;[9] a law which requires the masters of vessels engaged in foreign commerce to pay a certain sum on account of every passenger brought from a foreign country into the State, or before landing any alien passenger in the State;[10] a statute imposing a burdensome condition on a shipmaster, as a prerequisite to landing his passengers, or an alterna-

tive payment of a small sum of money for each of them;[11] a statute giving to a board of railroad commissioners power to regulate or interfere with the transportation of persons or merchandise by a steamship company between ports in different States;[12] an act in relation to the survey of hatches of sea-going vessels;[13] a tax upon a corporation, whose only business within the State was the landing and receiving of freight and passengers ferried across a river from another State;[14] a statute imposing limitations upon foreign corporations making contracts for carrying on commerce between the States;[15] a law forbidding discriminations on account of race or color by railroads, steamboats, and other public conveyances, in carrying passengers, when applied to interstate commerce.[16] The power granted to Congress to regulate commerce among States being exclusive when the subjects are national in their character, or admit only of one uniform system of regulation, the failure of Congress to exercise that power in any case is an expression of its will that the subject shall be left free from restrictions or impositions upon it by the several States.[17]

1 Wabash, St. L. & P. R'y Co. v. Illinois, 118 U. S. 557; distinguishing Munn v. Illinois, 94 U. S. 113; Chicago, B. & Q. R. R. Co. v. Iowa, 94 U. S. 155; Peik v. Chicago & N. W. R'y. 94 U. S. 164.

2 Brown v. Maryland, 12 Wheat. 419. See Cook v. Pennsylvania, 97 U. S. 566; compare Woodruff v. Parham, 8 Wall. 129.

3 Cook v. Pennsylvania, 97 U. S. 566; Waring v. The Mayor etc. 8 Wall. 110.

4 Gibbons v. Ogden, 9 Wheat. 1.

5 Pennsylvania v. Wheeling etc. Bridge Co. 13 How. 518. But an act of Congress, declaring the bridge to be a lawful structure, was held a valid exercise of its power to regulate commerce, and to have annulled the decree of the Supreme Court adjudging it to be a nuisance and requiring its abatement: The Wheeling Bridge Case, 18 How. 429; The Clinton Bridge, 10 Wall. 451; Bridge Co. v. U. S. 105 U. S. 470.

6 Kentucky & Ind. Bridge Co. v. Louisville & N. R. R. Co. 2 Int. Com. C. 162.

7 Kentucky & Ind. Bridge Co. v. Louisville & N. R. R. Co. 2 Int. Com. C. 162.

8 Sinnot v. Commissioners of Mobile, 22 How. 227; Foster v. Commissioners of Mobile, 22 How. 244.

9 Steamship Co. v. Portwardens, 6 Wall. 31.

10 Passenger Cases, 7 How. 283 (1848), four judges dissenting; People v. Campagnie, 107 U. S. 59.

11 Henderson v. Mayor, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; People v. Campagnie, 107 U. S. 59.

12 Pacific etc. Co. v. Board of R. R. Comm'rs, 18 Fed. Rep. 10.

13 Foster v. Master and Wardens, 94 U. S. 246.

14 Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

15 Cooper Manufacturing Co. v. Ferguson, 113 U. S. 727; Paul v. Virginia, 8 Wall. 163; Norfolk & W. R. R. Co. v. Commonwealth, (Pa.), 26 Am. & Eng. R. R. Cas. 48; Indiana v. Pullman P. C. Co. 16 Fed. Rep. 193.

16 Hall v. De Cuir, 95 U. S. 485.

17 Robbins v. Shelby County Taxing District, 120 U. S. 489; Walling v. Michigan, 116 U. S. 446, 455; Brown v. Houston, 114 U. S. 622; Railroad Comm'rs v. Railroad Co. 22 S. Car. 220; S. C. 26 Am. & Eng. R. R. Cas. 29, 41; Bowman v. Chicago & N. W. R'y Co. 125 U. S. 465.

§ 1016. The extent of the power to regulate which remains in the several States.—In the absence of legislation by Congress, the States have power to regulate such subjects of commerce as are local in their nature, or limited in their sphere of operation. So, it is held that when Congress has not provided laws for the regulation of pilots and pilotage, the State may lawfully enact them.[1] A State has power to improve its lands, and promote the public health, by authorizing a dam to be built across a creek, though it was previously navigable by vessels enrolled and licensed for the coasting trade;[2] and may authorize the construction of a bridge across a river, although it is tidal and navigable.[3] An act for the improvement of a harbor was held valid.[4] A municipality owning improved wharves is authorized to charge reasonable wharfage fees.[5] State laws creating liens in favor of material-men for supplies furnished to a vessel

in her home port are valid.[6] Where Congress has made no regulation as to the liability for marine torts resulting in death, a State statute, giving a right of action to the personal representatives of the deceased, was held to be no encroachment upon the commercial power of Congress.[7] As to all questions concerning commerce which were not granted exclusively to Congress, the States retain their jurisdiction. Among these are inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are parts of this mass. They may regulate such commerce as is purely domestic and internal.[8] They may grant an exclusive ferry right, and prevent a vessel from exercising the ordinary business of ferrying goods and passengers across the river between two points for pay.[10] And they may license, tax, and regulate ferries.[11] The statute requiring the inspection of tobacco and prescribing charges therefor was held not a regulation of commerce.[12] A law to prevent the destruction of oysters, and forfeiting a vessel violating the same, was upheld.[13] A State may prescribe the terms upon which a foreign insurance company may do business within its borders.[14]

1 Cooley v. Wardens of Philadelphia, 12 How. 299, 319; Gilman v. Philadelphia, 3 Wall. 713; Ex parte McNeil, 13 Wall. 236; Crandall v. Nevada, 6 Wall. 35; 16 Wall. 482; Packet Co. v. Aiken, 16 Fed. Rep. 896; Wilson v. McNamee, 102 U. S. 572; The Lottawanna, 21 Wall. 558, 581; County of Mobile v. Kimball, 102 U. S. 691. See Henderson v. Mayor etc. 92 U. S. 272, 273; Wilson v. McNamee, 102 U. S. 572; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196. But if Congress has legislated concerning pilotage, a conflicting State statute will be declared void: Sprague v. Thompson, 118 U. S. 90.

2 Wilson v. Blackbird Creek Marsh Co. 2 Pet. 245; Cardwell v. Bridge Co. 113 U. S. 205.

3 Gilman v. Philadelphia, 3 Wall. 713; Escanaba Co. v. Chicago, 107

S. 678; Cardwell v. Bridge Co. 113 U. S. 205. See, also, The Passaic ıdges, 3 Wall. 782.

4 County of Mobile v. Kimball, 102 U. S. 691.

5 Packet Co. v. Keokuk, 95 U. S. 80; Packet Co. v. St. Louis, 100 U. S. 3; Packet Co. v. Cadlettsburg, 105 U. S. 559; Transportation Co. v. Parksburg, 107 U. S. 691.

6 The Lottawanna, 21 Wall. 558.

7 Sherlock v. Alling, 93 U. S. 99.

8 Gibbons v. Ogden, 9 Wheat. 1203; Steamship Co. v. Portwardens, 6 Wall. 31, 33; Railway Co. v. Fuller, 17 Wall. 560, 568.

9 Veazie v. Moore, 14 How. 568, 573-4, in which a State law, granting to an individual an exclusive right to navigate the upper waters of the Penobscot river, lying wholly within the State, sepa ated from tide water by falls impassable for purposes of navigation, and not forming a part of any continuous track of commerce between two or more States, or with a foreign country, was held not repugnant to the constitution or any law of the United States. See Wabash, etc. R'y Co. v. Illinois, 118 U. S. 557.

10 Conway v. Taylor's Ex'r, 1 Black, 603; Fanning v. Gregoire, 9 How. 534; Starin v. New York, 115 U. S. 709.

11 Wiggins Ferry Co. v. E. St. Louis, 107 U. S. 365, 374-5. But see Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, § 9, p. 8.

12 Turner v. Maryland, 107 U. S. 38. Inspection laws have exclusive reference to personal property: People v. Campagnie, 107 U. S. 59, 61. As to what are proper quarantine, inspection, and health laws, see Railroad Co. v. Husen, 95 U. S. 465; Turner v. Maryland, 107 U. S. 38.

13 Smith v. Maryland, 18 How. 71.

14 Paul v. Virginia, 8 Wall. 163: Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; Phila. Fire Ass'n. v. New York, 119 U. S. 110.

§ 1017. State regulation by taxation.—While the taxing power is a necessary incident of all governments, it must be so exercised by the States themselves as not to restrict commerce among the States. The regulation of such commerce cannot be accomplished by the States by means of it. A State statute imposing a tax upon freight carried out of it or brought within it has for this reason been declared void.[1] Interstate commerce cannot be taxed at all by a State, even though the same tax be laid on domestic commerce.[2] An act which imposed a privilege tax of fifty dollars per annum on every sleeping-car or coach used or run over a railroad in Tennessee, and not owned by the railroad, was held void so far as it applied to the interstate transport-

foreign securities;[2] upon peddlers of sewing-machines;[3] upon traveling salesmen.[4] A State tax upon legacies payable to aliens is not a regulation of commerce.[5] A uniform State tax upon all sales whether made by a citizen of one State or some other State, and whether the goods sold are the produce of that State or some other State, is valid.[6] A State statute which levies a tax upon gross receipts of railroads from the carriage of freights and passengers into, out of, or through the State is a tax upon commerce among the States and therefore void;[7] but a State tax upon the gross receipts of railways incorporated by the State and having their principal offices there, though made up in part from freights received on goods transported from and to other States, is not a regulation of interstate commerce.[8] A State tax upon railroad and stage companies for every passenger carried out of the State by them was held to be a regulation of commerce of a local character, and valid in the absence of congressional action.[9]

1 License Cases, 5 How. 504; or prohibitory laws: Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U. S. 25; Kansas v. Bradley, 26 Fed. Rep. 289; Thurlow v. Massachusetts, 5 How. 504. But a State local option law cannot discriminate between domestic and other wines: Weil v. Calhoun, 25 Fed. Rep. 865.

2 Nathan v. Louisiana, 8 How. 73.

3 Machine Co. v. Gage, 110 U. S. 676.

4 In re Rudolph, 2 Fed. Rep. 65; but a State law requiring a license to sell imported goods in the original package is unconstitutional: Cook v. Pennsylvania, 97 U. S. 566; Brown v. Maryland, 12 Wheat. 419.

5 Mager v. Grima, 3 How. 490.

6 Woodruff v. Parham, 8 Wall. 123; Machine Co. v. Gage, 100 U. S. 676.

7 Fargo v. Michigan, 121 U. S. 230.

8 State Tax on Railway Gross Receipts, 15 Wall. 234; The Delaware Railroad Tax, 18 Wall. 206; Baltimore & O. R. R. Co. v. Maryland, 21 Wall. 456.

9 Crandall v. Nevada, 6 Wall. 35; CHASE, C. J., and CLIFFORD, J., dissenting, on the ground that "commerce is secured against such legisla-

ion in the States by the constitution, irrespective of congressional action." ee this case commented on: Case of the State Freight Tax, 15 Wall. 232, 81. See, also, Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Wabash etc. R'y Co. v. Illinois, 118 U. S. 557.

§ 1019. **State regulation under the police power.**—The only limitation upon the exclusive control of Congress over commerce among the States is to be found in the exercise by the several States of the "police power," the extent and nature of which are not yet fully and exactly defined.[1] It certainly includes the duty and power of protecting the health, lives and safety of the people, and, in this respect, is expressed by the maxim, *salus populi suprema lex.* An act which inflicted a penalty upon the master of a vessel arriving from a foreign port, who neglected to report an account of his passengers, is not a regulation of commerce, but of police.[1] Quarantine laws are a rightful exercise of the police power for the protection of health.[2] Whether under the police power the States may prevent criminals, paupers and diseased persons coming from abroad is not decided.[3] A State law providing that a person having in his possession "Texas cattle" should be liable for any damages which might result from allowing them to run at large and thereby spread the "Texas fever," was held to be constitutional;[4] but one prohibiting the sale of meat unless slaughtered within twenty-four hours after the inspection of the animals by local officers, was held void for invading the power of Congress, its effect being to exclude meats slaughtered without the State.[5] A State law requiring railroads annually to fix their rates, publish the same, and punishing the charging of a higher rate, was held, in the case of a railroad running through

several States, to be the exercise of the po power reserved to the States.[6] A State law requ ing telegraph companies and other companies usi poles and wires for the transmission of electrici to remove their poles and wires from the streets large cities and to place them in underground co duits, was sustained as being a proper exercise the police power, although the telegraph compan was engaged in interstate commerce, and was th agent of the government of the United States and had the right, under an act of Congress, to oc cupy post-roads.[7] But, under such a law, telegrap companies cannot be compelled to remove their wires from the structures of elevated railroads.[8] A State statute requiring locomotive engineers to be examined as to their capacity to distinguish colors, at the expense of the several railroad companies, was held to be within the competency of the State to enact, Congress not having legislated upon the subject.[9] So, also, a similar statute requiring engineers to be examined and licensed was held not to be a regulation of interstate commerce, its purpose being to secure the safety of persons and property.[10] The capacity of a State to enact laws which practically affect commerce among the States, by the exercise of its police power, for the comfort and security of persons and the protection of property, has been summarized as follows: by establishing and regulating channels for commercial facilities, by the passage of inspection laws and laws to restrict the sale of articles injurious to health and morals, by the imposition of taxes upon avocations within its borders not interfering with foreign or interstate commerce or employment, or

with business exercised under the authority of the constitution of the United States.[11] A State cannot, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States, unless the consent of Congress, express or implied, is first obtained.[12]

1 Mayor etc. of N. Y. v. Miln, 11 Pet. 102, STORY, J., dissenting; criticised in Henderson v. Mayor etc. 92 U. S. 259.

2 Morgan v. Louisiana, 118 U. S. 455.

3 Henderson v. Mayor, 92 U. S. 259, 275; Chy Lung v. Freeman, 92 U. S. 275; Railroad Co. v. Husen, 94 U. S. 465.

4 Kimmish v. Ball, 129 U. S. 217.

5 In re Barber, 39 Fed. Rep. 641.

6 Chicago & N. W. Railroad Co. v. Fuller, 17 Wall. 560; Rae v. Grand Trunk R'y Co. 14 Fed. Rep. 401. But see Wabash, St. Louis & P. R'y Co. v. Illinois, 118 U. S. 557. See, also, Laurel Fork & S. H. R. R. Co. v. West Virginia Trans. Co. 25 W. Va. 324; West Virginia T. Co. v. Sweetzer, 25 W. Va. 434.

7 Western Union Tel. Co. v. New York, 38 Fed. Rep. 552 (1889).

8 *Ibid.*

9 Nashville, C. & St. L. R'y Co. v. Alabama, 128 U. S. 96.

10 Smith v. Alabama, 124 U. S. 465.

11 Robbins v. Shelby Co. Taxing Dist. 120 U. S. 489.

12 Bowman v. Chicago & Northwestern R'y Co. 125 U. S. 465. And see Pierce v. New Hampshire, 5 How. 504.

§ 1020. **Interstate commerce legislation—The present law.**—The power over commerce among the States conferred upon Congress by the clause of the federal constitution above quoted has been directly exercised by it in the passage of several important statutes. The Act of March 3, 1873 (Revised Statutes, §§ 4386-4390), regulated the transportation of cattle, sheep, swine and other animals upon interstate railroads. This act was held to be constitutional under the commerce clause;[1] but its operation was strictly confined to the transportation of such animals from one State to another, and it was construed not to include their

transportation between points in the same St
On July 24, 1866, an act was passed comm
known as the General Telegraph Act, confer
upon such telegraph companies as should, in w
ing, accept its provisions, the right, among oth
of constructing their lines upon the post-road
the United States, and making them agents of
government for certain purposes. Its constituti
al.ty is recognized, and under its authority a St
statute attempting to confer exclusive privileg
upon a telegraph company within certain counti
of the State was declared ineffective as against
company which had in due form, accepted the pr
visions of the act.[3] An act providing that railroa
companies transporting property from one State t
another may "connect with roads of other State
so as to form *continuous lines* for the transporta
tion of the same to the place of destination" has
also been recognized as constitutional.[4] It is als
settled that Congress has the right to fix the maxi-
mum compensation for transportation of persons
and property between the States and with foreign
countries.[5] The Interstate Commerce Act was
passed by Congress after long debate and formidable
opposition, for the purpose of establishing a uni-
form system of commerce among the States, and
of correcting many of the evils which had been
fostered by the sharp competition among carriers
of freight and passengers, which was the natural
result of the rapid and enormous growth of the
railroads of the United States. It marks an
epoch in federal legislation, in that it is the first oc-
casion upon which Congress has attempted the reg-
ulation of commerce among the States in a general

ıd comprehensive way. A careful study of the ɔbates attending its passage will assist in the inɔrpretation of many of its provisions and furnish ıe reasons for their adoption, but courts will not onsider the opinions of the individual debaters.[6] Many of its provisions had been previously enacted in England;[7] and are closely followed and n some cases copied literally. The decisions of the English courts are consequently of great value in the study of the act of Congress, especially in view of the fact that the Supreme Court of the United States has recognized the rule, that where English statutes have been adopted into our own legislation, the known and settled construction of those statutes by courts of law are to be considered as silently incorporated into the acts, and are to be received as authority.[8] The English acts here referred to have uniformly been construed by the English courts in the interest of and for the convenience of the public.[9] The original act entitled "An Act to Regulate commerce" was approved February 4, 1887, and went into effect April 5, 1887.[10]

1 United States v. Boston & A. R. R. Co. 15 Fed. Rep. 209; United States v. Louisville & N. R. R. Co. 18 Fed. Rep. 480.

2 United States v. East Tennessee, V. & G. R. R. Co. 13 Fed. Rep. 642.

3 Pensacola Tel. Co. v. W. U. Tel. Co. 96 U. S. 1; Telegraph Co. v. Texas, 105 U. S. 460. For other decisions upon similar points, see United States v. Coombs, 12 Pet. 72; South Carolina v. Georgia, 93 U. S. 4; Stone v. Farmers' Loan & Trust Co. 116 U. S. 307.

4 Railroad Co. v. Richmond, 19 Wall. 584; Council Bluffs v. Kansas City etc. R. R. Co. 45 Iowa, 338, 351; Hardy v. Atchison etc. R. R. Co. 32 Kans. 698, 717; Missouri Pac. R'y Co. v. Texas & Pac. R'y Co. 30 Fed. Rep. 2.

5 Canada S. R'y Co. v. International Bridge Co. 8 Fed. Rep. 190; Louisville & N. R. R. Co. v. Railroad Comm'rs, 19 Fed. Rep. 679.

6 United States v. Union Pac. R'y Co. 91 U. S. 72. History of the act: see Louisville v. Nashville R. R. Co. 1 Int. Com. C. 74; Report of Commission, 1 Int. Com. C. 256. Leading features stated by the Commission in their report, 1 Inter. Com. C. 260.

7 The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. ch. 3 Regulation of Railways Act, 1868, 31 & 32 Vict. ch. 119; The Eq tion of Railways Act, 1873, 36 & 37 Vict. ch. 48. See Little Rock & M R. Co. v. East Tenn. Va. & Ga. R. R. Co. 3 Inter. Com. C. 1.

8 McDonald v. Hovey, 110 U. S. 619; Cathcart v. Robinson, 5 Pet. Pennock v. Dialogue, 2 Pet. 1; McCool v. Smith, 1 Black, 459; The botsford, 98 U. S. 440. But English decisions rendered subsequent the adoption of the statute in this country, have not the same we Cathcart v. Robinson, 5 Pet. 264.

9 Caledonian R'y Co. v. N. B. R'y Co. 3 Nev. & Mac. R'y Cas. Belfast etc. R'y Co. v. G. N. R'y Co. 3 Nev. & Mac. R'y Cas. 419; Hud field v. R'y Co. 4 R'y & Can. Traf. Cas. 44; Central Wales etc. R'y C Gt. West. R'y Co. 4 R'y & Can. Traf. Cas. 110; Belfast etc. R'y Co. v. G. R'y Co. R'y & Can. Traf Cas. 159.

10 24 U. S. Stat. at Large, 379. The act amending it was approved went into effect March 2, 1889: 25 U. S. Stat. at Large, 855.

§ 1021. **Its constitutionality.**—The constitutionality of the act, as a whole, has not, as yet been directly passed upon by the courts. It may, however, be inferred, from their reasoning in discussing the extent of the power of Congress under the commerce clause, and from their judgments as to the validity of other acts affecting interstate commerce,[1] that Congress had ample power to pass the act, and that its provisions are proper to effect its object. The decisions holding that similar State statutes are unconstitutional because the power to prescribe rules on the subject is vested solely in Congress, may be regarded as direct authorities for the constitutionality of the act.[2] As to the effect of the act upon contracts existing at the time it went into effect, there may be some discussion; but it is hardly to be doubted that the courts will, in this case, adopt the rule prescribed in similar cases, and hold that, if otherwise valid, such contracts will not be adversely affected.[3] The question involves the right of Congress to pass laws impairing the obligation of contracts, a right which is expressly denied to the

ates by the constitution. The framers of that strument seem to have regarded such a power as inconsistent with natural right and justice, and have believed that an express denial of the power to Congress was unnecessary.[4] In so far as the Supreme Court has discussed the question, the result appears to be, that, while a law of Congress, the direct effect of which would be to impair the obligation of contracts, is unconstitutional and void, yet a law will not be held to be unconstitutional merely because it may indirectly and necessarily have that effect, especially if its purpose and object be the general good of the whole people.[5] The act was not intended to invade or impair private contracts between common carriers, which were valid when made and not in conflict with its provisions.[6] Nor was it designed to advance the interest of carriers, but for the benefit and advantage of the commerce they may transport.[7] The law should be liberally construed in favor of commerce between the States.[8]

1 See cases cited in the preceding section.

2 Wabash etc. R'y Co. v. Illinois, 118 U. S. 557; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196; Pickard v. Pullman etc. Car Co. 117 U. S. 34; Railroad Comm'rs v. Railroad Co. 22 S. C. 220; Mobile & Ohio R. R. Co. v. Sessions, 28 Fed. Rep. 592; Illinois Central R. R. Co. v. Stone, 20 Fed. Rep. 468; Louisville & N. R. R. Co. v. Railroad Comm'rs of Tennessee, 19 Fed. Rep. 679; Pacific Coast Steamship Co. v. Railroad Comm'rs of California, 9 Sawy. 253; S. C. 18 Fed. Rep. 10; Kaeiser v. Illinois Central R. R. Co. 18 Fed. Rep. 151.

3 Railroad Co. v. Richmond, 19 Wall. 584; Chicago & Alton R. R. Co. v. Chicago etc. Coal Co. 79 Ill. 127.

4 Federalist, Nos. VII and XLIV.

5 Calder v. Bull, 3 Dall. 388; Ogden v. Saunders, 12 Wheat. 303; Hepburn v. Griswold, 8 Wall. 604; Legal Tender Cases, 12 Wall. 457; Railroad Co. v. Richmond, 19 Wall. 584; Sinking Fund Cases, 99 U. S. 737. And see a valuable article by Mr. C. H. Phelps, 1 R'y & Corp. Law J. 362.

6 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. Rep. 567.

7 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. Rep. 567.

8 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. Rep. 567.

CHAPTER XI.

THE INTERSTATE COMMERCE ACT.

§ 1022. Carriers subject to the act.
§ 1023. Common control, management, *et ceters*.
§ 1024. Unjust and unreasonable charges prohibited.
§ 1025. Elements to be considered in determining reasonableness of rate
§ 1026. The same subject, continued—Discrimination between places as persons.
§ 1027. Cost of service.
§ 1028. Distance as affecting rates.
§ 1029. Proceedings to test reasonableness of rates.
§ 1030. Unjust discrimination forbidden.
§ 1031. "Similar circumstances and conditions."
§ 1032. "Devices"—Rebates—Like kind of traffic.
§ 1033. Differences in rates on different parts of railway.
§ 1034. Equality of rates and facilities.
§ 1035. Lawful discrimination—Cost of service.
§ 1036. The same subject, continued—Quantity of freight shipped.
§ 1037. Competition.
§ 1038. Regulation of passenger traffic.
§ 1039. The same subject, continued—Free passes—Equal accommodations.
§ 1040. Obligation of railway company to supply suitable and sufficient cars.

§ 1022. Carriers subject to the act.—"SEC. 1. "PAR. 1. *Be it enacted by the Senate and House of "Representatives of the United States of America in "Congress assembled*, That the provisions of this act "shall apply to any common carrier or carriers en- "gaged in the transportation of passengers or property "wholly by railroad, or partly by railroad and part- 'y by water, when both are used, under a common ntrol, management, or arrangement, for a con-

tinuous carriage or shipment, from one State or territory of the United States, or the District of Columbia, to any other State or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country; *provided, however*, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or territory as aforesaid."

The first section of the act not only expressly includes railroads as carriers to be subjected to its provisions, but confines the operation of the act to such carriers of interstate commerce as are engaged in transporting passengers or property by means of railroads, either wholly or partly. Nearly all the railroads in the country are or may be used to a greater or less extent as links in through transportation.[1] Other carriers subject to the act are transportation companies, despatch companies, fast freight lines,[2] and express companies.[3] Such companies are common carriers, though they do not own

the cars used in their business.[4] Where a railway company, by contract, acquires the right to use a bridge, the railway company is regarded as the owner or operator of the bridge, as to its freight transported over the bridge, and as to that traffic it, and not the bridge company, is the common carrier within the meaning of the act.[5] A short railroad, wholly within a State, used and operated only by companies owning connecting interstate roads for interstate business, is one of the "instrumentalities of shipment or carriage" included in the term "transportation," and the carriers using it are subject to the provisions of the act. In respect to such traffic, the duties of such carriers to the public are the same, without respect to ownership, corporate control, the authority or means of its construction.[6] The fact that the owner of merchandise which is offered to a carrier for transportation from one point to another in the same State, intends to have it further transported by a second carrier into another State, does not make such first transportation interstate commerce, even though the first carrier may be informed of the ultimate destination of the merchandise.[7] Where traffic originating in a State was destined to an adjoining State, from which it was separated by a river, but was delivered by the railroad to the consignee at a point on the river opposite its destination, the rates of the railroad being made to such point and not to the place of destination, it was held that such traffic was not interstate, in so far as the railroad conducted it.[8] The provisions of the act to regulate commerce apply to foreign as well as domestic common carriers engaged in the transportation of

passengers or property, for a continuous carriage or shipment, from a place in the United States to a place in an adjacent foreign country.[9]

"SEC. 1, PAR. 2. The term 'railroad' as used in "this act shall include all bridges and ferries used "or operated in connection with any railroad, and "also all the road in use by any corporation oper- "ating a railroad, whether owned or operated under "a contract, agreement, or lease, and the term "'transportation' shall include all instrumentali- "ties of shipment or carriage."[10]

The Interstate Commerce Act does not include or apply to all carriers engaged in interstate commerce, but only to such as use a railway, or a railway and water-craft, "under common control, management, or arrangement for a continuous carriage or shipment" of property from one State to another; nor does it extend to the transportation of property by rail wholly within the State, even though shipped from or destined to a place without the State, so that such place is not in a foreign country.[11]

1 Baltimore & O. R. R. Co. v. Maryland, 21 Wall. 453, 469, per BRADLEY, J. See Reports of the Commission, 1 Inter. Com. C. 271, and 2 Inter. Com. C. 338; "Interstate Railroads and their Regulation by National Legislation," by R. P. Harlow, 4 N. Y. St. Bar Assoc. Rep. 207.

2 Mercantile Mut. Ins. Co. v. Chase, 1 Smith E. D. 115; Angell on Carriers, § 76; Redfield on Carriers, § 197; Hutchinson on Carriers, § 72; Fargo v. Michigan, 121 U. S. 230; "Interstate Commerce," 23 Cent. Law J. 577.

3 In re Express Companies, 1 Inter. Com. C. 349; Report of Commission, 1 Inter. Com. C. 273; Report of Commission, 2 Inter. Com. C. 402; Sherman v. American Ex. Co. 23 Ill. 197; 26 Ill. 504; American Ins. Co. v. Pinckney, 29 Ill. 392; Belger v. Dinsmore, 51 N. Y. 166; Haslam v. Adams Ex. Co. 6 Bosw. 235; Lowell Wire Fence Co. v. Sargent, 8 Allen, 189; Buckland v. Adams Ex. Co. 97 Mass. 124; Southern Ex. Co. v. Newby, 36 Ga. 635; United States Ex. Co. v. Backman, 28 Ohio St. 144; Hutchinson on Carriers, § 68.

4 United States Ex. Co. v. Bachman, 28 Ohio St. 174; Buckland v. Adams Ex. Co. 97 Mass. 124. As to whether sleeping-car companies are within the act, see Pickard v. Pullman Co. 117 U. S. 34; Nevin v. Pullman Co. 11 Am. & Eng. R. R. Cas. 92; Indiana v. Pullman Co. 16 Fed. Rep. 193; 11 Biss. 561.

5 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fe Rep. 567.

6 Heck v. East Tennessee etc. R'y Co. 1 Inter. Com. C. 495.

7 Missouri & Ill. R. T. & L. Co. v. Cape Girardeau & S. W. R'y C Inter. Com. C. 30.

8 New Jersey Fruit Ex. v. Central R. R. of N. J. 2 Inter. Com. C. 1.

9 In re Grand Trunk R'y of Canada, 3 Inter. Com. C. 29.

10 "Railway," defined in the Railway and Canal Traffic Act, 1854, § and Regulation of Railways Act, 1873, § 3; "Traffic," defined in Railway and Canal Traffic Act, 1854, § 1, and Regulation of Railways A 1873, § 3. A short line, used by connecting lines for interstate traf held to be an "instrumentality of shipment or carriage," and subject the act: Heck v. East Tennessee etc. R. R. Co. 1 Inter. Com. C. 495.

11 Ex parte Koehler, 30 Fed. Rep. 867.

§ 1023. **Common control, management, et cetera.**—The phrase, "under common control, management, or arrangement," it would seem, has reference to the preceding clause, "or partly by railroad and partly by water, when both are used"; so that the statute applies to two classes of carriers: (1) those "engaged in the transportation of passengers and property wholly by railroad . . . for a continuous carriage or shipment from one State or territory," etc.; and (2) to "carriers engaged in the transportation of passengers or property . . . . . partly by railroad and partly by water, when both are used under a common control, management, or arrangement, for a continuous carriage or shipment from one State or territory," etc.[1] The word "arrangement" is found in the English acts, after which the Interstate Commerce Act was to a great extent modeled,[2] and only in connection with the combination of railway and water transportation, from which it may be inferred that it is here used with the same intention. The first class includes all roads in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and also,

'all bridges or ferries used or operated in connection with any railroad,"[3] and also carriers engaged in the transportation of passengers or property by railroad for a continuous carriage or shipment between States, territories, etc., without reference to whether it is by virtue of a contract or arrangement between the connecting lines.[4] A railroad company cannot be compelled to contract for the carriage of individuals or goods beyond its own line, and thus assume the liability of a common carrier for transportation over other lines;[5] but it seems that it may be compelled by statute to afford facilities by which the transportation over its own and connecting lines shall be continuous.[6] As to the second class, it has been held that the mere fact that a railway wholly within a State, and a vessel running between said State and another, meet at a point within the State, and thus form a continuous line of transportation between the two States, does not bring the carriers who so use the railway and steamer within the act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act, the railway and vessel must be operated and used under a "common control"—a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one.[7] Where a railroad company contracted to use Pullman cars on all roads which it then operated, or might thereafter control

by ownership, lease, or otherwise, it was held that its subsequent acquisition of a majority of the stock of another railroad, by voting upon which elected a board of directors for that railroad, did not give it "control" within the meaning of the contract.[5] Under the English statute[9] it has been held that an agreement between a steamboat company and a railway company that the vessels of the former company should ply between two ports for a certain time and upon certain days, the hours of departure being determined by the steamboat company, regard being had to the convenience of the railway company, and to the times of the arrival and departure of trains, and containing a clause that any dispute as to its provisions should be referred to the decision of an arbitrator, is an arrangement for using, maintaining, or working steam vessels.[10] But the mere fact of the existence of "through bookings" between such companies was held not to be an *arrangement* under the act.[11] The proviso to this paragraph merely recognizes the fact that the control of strictly domestic commerce is reserved by the constitution to the several States.

1 J. C. Harper, "The Law of Interstate Commerce," p. 32.

2 Regulation of Railways Act, 1873, § 11; Railway and Canal Traffic Act, 1854, § 2.

3 Paragraph 2, section 1.

4 Coe v. Errol, 116 U. S. 517; The Daniel Ball, 10 Wall. 557, 565; Sherlock v. Alling, 93 U. S. 99, 103; Pacific etc. Co. v. Railroad Commissioners, 9 Sawy. 253; 18 Fed. Rep. 10; Hardy v. Atchison etc. R. R. Co. 32 Kan. 717.

5 Mineral Springs M'f'g Co. v. Michigan Central R. R. Co. 16 Wall. 318; Ogdensburg etc. R. R. Co. v. Pratt, 22 Wall. 123; Stewart v. Terre Haute etc. R. R. Co. 3 Fed. Rep. 768; and cases cited on p. 769.

6 Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co. 110 U. S. 667.

7 Ex parte Koehler, 30 Fed. Rep. 867.

8 Pullman Palace Car Co. v. Missouri Pac. R'y Co. 115 U. S. 582, affirming S. C. 11 Fed. Rep. 634.

9 Regulation of Railways Act, 1873, § 11.

10 Belfast etc. R'y Co. v. Great Northern R'y Co. 4 R'y & Can. Traf. Cas. 79. And see Caledonian R'y Co. etc. v. Greenock etc. R'y Co. 4 R'y & Can. Traf. Cas. 135; Greenock R'y Co. v. Caledonian R'y Co. 2 Nev. & Mac. R'y Cas. 227.

11 Ayr Harbor Trustees v. Glasgow R'y Co. 4 R'y & Can. Traf. Cas. 312.

§ 1024. Unjust and unreasonable charges prohibited.—"SEC. 1, PAR. 3. All charges made for any "service rendered, or to be rendered, in the transportation of passengers or property as aforesaid, "or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust "and unreasonable charge for such service is prohibited, and declared to be unlawful."

This paragraph is merely declaratory of the obligation resting upon common carriers at common law to carry goods for a reasonable compensation.[1] This duty does not preclude special contracts regulating freight charges.[2] At common law, an excess over a reasonable charge could be recovered in an action for money had and received; and, in such an action, a lower rate made to another was held to be evidence that the higher rate was unreasonable.[3] As we have already shown,[4] railroads are *quasi*-public corporations. They must be conducted in furtherance of the public objects of their creation.[5] As common carriers, they have duties to perform in which the public are interested.[6] Under the common law, the legislature may declare what shall be a reasonable compensation, by fixing a maximum beyond which any charge made will be unreasonable.[7] But such statutes do not extend to interstate commerce.[8] A statute fixing maximum charges determines conclusively that charges in excess of those fixed are

unreasonable; evidence to prove the excessive charges to be reasonable is immaterial.[9] Under a State statute, it was decided that, in order to recover penalties for unreasonable charges, it must be proved that the charges exceed the maximum rates fixed by the railroad commissioners.[10] Charges so fixed cannot be increased by wrongfully diverting freight from its proper course.[11] The constitutions of several of the American States confer upon the legislature authority to fix reasonable maximum freight and passenger rates.[12] In California the same authority is conferred upon the railroad commissioners.[13]

1 Great Western R'y Co. v. Sutton, Law R. 4 Eng. & Ir. App. 226, 27; Angell on Carriers, § 124; Johnson v. Railroad Co. 16 Fla. 623; Baxendale v. Eastern Counties R'y, 4 Com. B. N. S. 63; Branley v. South Eastern R'y, 12 Com. B. N.S. 63; Fitchburg R. R. Co. v. Gage, 12 Gray, 393; Ex parte Benson, 18 S. C. 38; Menacho v. Ward, 27 Fed. Rep. 531; S. C. 23 Am. & Eng. R. R. Cas. 647; 34 Alb. Law J. 44; Messenger v. Penn. R. R. Co. 36 N. J. 407; McDuffie v. Railroad Co. 52 N. H. 430; Munn v. Illinois, 94 U. S. 113, 131; Sandford v. R. R. Co. 24 Pa. St. 378; Shipper v. Penn. R. R. Co. 47 Pa. St. 338, 341; Audenried v. P. & R. R. R. Co. 68 Pa. St. 370; Chicago B. & Q. R. R. Co. v. Parks, 18 Ill. 460; Chicago & Alton R. R. Co. v. People, 67 Ill. 11; Scofield v. Lake Shore etc. R'y Co. 43 Ohio St. 571; New England Exp. Co v. Maine Central R. R. Co. 57 Me. 188; Hays v. Pennsylvania Co. 12 Fed. Rep. 309; Hollister v. Nowlen, 19 Wend. 239; Smith v. Chicago etc. R. R. Co 5 N. W. Rep. 242; Brown v. Adams Exp. Co. 15 W. Va. 821; "Relations which Railroad Corporations bear to the State," by Jas. McCartney (1885), 7 Ill. Bar Assoc. 89.

2 Killmer v. New York Central & Hudson R'v. R. R. Co. 100 N. Y. 396.

3 Gt. Western R'y Co. v. Sutton, Law R. 4 Eng. & Ir. App. 226, 27 (H. L.); Angell on Carriers, § 124; Johnson v. Railroad Co. 16 Fla. 623. See also, Killmer v. N. Y. C. & H. R. R. Co. 100 N. Y. 395; "Legal Relations of Railroad Corporations to the Public," by John Mayo Palmer (1882), 4 Ill. St. Bar Assoc. 126.

4 *Supra.*

5 Railroad Comm'rs v. Portland etc. R. R. Co. 63 Me. 269, 277; State v. Republican V. R. R. Co. 17 Neb. 647; Louisville & N. R. R. Co. v. Railroad Comm'rs, 19 Fed. Rep. 679; "Power of Legislature to fix Rates of Carriers," by O. W. Aldrich, 3 Ohio Law J. 644; "Legislative Power to Regulate Railroad Franchises," by G. B. Dantz, 12 Cent. Law J. 194.

6 Chicago etc. R. R. Co. v. Iowa, 94 U. S. 155; Munn v. Illinois, 94 U. S. 113; Peik v. Chicago etc. R'y Co. 94 U. S. 164; Louisville & N. R. R. Co. v. Railroad Comm'rs, 19 Fed. Rep. 679; "Legislative Control of Railroads," by S. S. Wallace, 3 South. L. Rev. 656; "Railroad Legislation," by Chas. W. Adams Jr. 2 Am. Law Rev. 25.

7 Munn v. Illinois, 94 U. S. 113; Chicago etc. R. R. Co. v. Iowa, 94 U. 155; Peik v. Chicago R. R. Co. 94 U. S. 164; "Legislative Control of Railroads," by F. L. Wells, 12 West. Jur. 17.

8 Wabash etc. R'y Co. v. Illinois, 118 U. S. 557; "Legislation concerning Railroads," by B. W. Duke, of the Louisville bar, 1 Ky. Law J. 163, 211.

9 Heiserman v. Burlington etc. R'y Co. 63 Iowa, 732. See Ruggles v. Illinois, 91 Ill. 256; S. C. 108 U. S. 526; Stone v. Farmers' L. & T. Co. 116 U. S. 307.

10 Chicago, B. & Q. R. R Co. v. People, 77 Ill. 443; and see Moore v. Illinois Cent. R. R. Co. 68 Ill. 385.

11 Burlington etc. R. R. Co. v. Chicago Lumber Co. 15 Neb. 390.

12 Stimson's Am. Stat. Law (1886), § 462, citing the constitutions of Ill., Mich., Neb., W. Va., Mo., and Tex.

13 Cal. Const. (1873) Art. XII, § 22.

§ 1025. Elements to be considered in determining reasonableness of rates.—Congress, in adopting this section, was legislating for the protection of the general public, and not for the protection of the carriers against the unreasonable action of their own officers, or against excessive competition.[1] Under the English acts, the question whether a rate is a "reasonable facility in the interests of the public," is held to be one of fact.[2] The length and character of the haul; the cost of the service; the volume of business; the conditions of competition; the storage capacity and the geographical situation at the different terminal points, are all elements of importance, bearing upon the relative reasonableness of the respective charges for transportation.[3] In determining what is a just and reasonable rate for a *particular commodity*, the commission will take into consideration the earnings and expenses of operation, the rates charged upon the same commodity by other roads as nearly similarly situated as may be, the diversities between the railroad in question and such other railroads, the relative amount of through and local business, the proportion borne by the commodity in question to the remainder of the local traffic, the market value of the commodity and its

gradual reduction, the reductions made by carrier upon other articles which are consumed s necessarily required by the producers of the ar in question, and all other circumstances affec the traffic of itself, and as related to other siderations entering i to the charges of the carri In short, all the surrounding circumstances a conditions must be considered, as well as the rig of the shi per, and if these circumstances and c ditions exercise any controlling influence in t making of the rate, they cannot be disregarde A full knowledge of all the facts concerning particular traffic and its relations to the oth traffic of the carrier is necessary to a proper d cision in each case.[6] The law requires uniformit and impartiality in the dealings of a carrier wi all persons.[7] Consideration should be had of co sequences which might follow a modification of th principle upon which the rates complained of a constructed.[8] So, where a change of rates woul involve a reduction of rates on other competin lines not parties to a proceeding, and unsettle re tive rates in a large extent of territory, such a change ought not to be made unless based upon adequate grounds.[9] Where a system of rates is made by a number of carriers covering a widely extended territory, which seem to be reasonable in themselves and relatively fair, they will not be changed at one important point, thereby rendering other changes unavoidable at a large number of other points, and throwing the rates of the entire stem into confusion, unless a case arises in which necessary that this should be done in order to rce compliance with the law and to reach the

ıds of substantial justice.[10] The relative reasonɔleness of rates on shipments from western points ı the United States to cities on the Atlantic seaoard, is to be determined by all the circumstances nd conditions that affect the traffic to the reɔective points between which the rates are ıuestioned, and not solely by any one standard of ɔomparison.[11]

1 In re Chicago, St. P. & R. C. R'y Co. 2 Inter. Com. C. 231.

2 Severn & Wye etc. R'y Co. v. Great Western R'y Co. 5 B. & Mac. 170; 13 Rep. R'y Com. 23.

3 Boston Chamber of Commerce v. Lake Shore & M. S. R. R. Co. et al. 1 Inter. Com. C. 436.

4 Evans v. Oregon R'y & Nav. Co. 1 Inter. Com. C. 325; Report of the Commission, 1 Inter. Com. C. 312.

5 Business Men's Ass'n v. Chicago etc. R'y Co. 2 Inter. Com. C. 52.

6 Howell v. New York, L. E. & W. R. R. Co. 2 Inter. Com. C. 272.

7 Hurlburt v. Lake Shore & M. S. R'y Co. 2 Inter. Com. C. 122.

8 Lincoln Board of Trade v. Missouri Pacific R'y Co. 2 Inter. Com. C. 155.

9 Rice et al. v. Western U. T. & P. R. R. Co. 2 Inter. Com. C. 389.

10 Detroit Board of Trade v. Grand Trunk R'y of Canada, 2 Inter. Com. C. 315.

11 Boston Chamber of Commerce v. Lake Shore & M. S. R. R. Co. et al. 1 Inter. Com. C. 436.

§ 1026. **The same subject, continued—Discrimination between places and persons.**—Rates must not only be reasonable in themselves, but they should be so relatively reasonable as to protect communities and business against unjust discrimination.[1] Trade centers or large commercial towns are not as a matter of right entitled to have more favorable rates than the smaller towns for which they form distributing centers.[2] Rates that are just and reasonable from selected manufacturing points, through an entire territory, are *prima facie* just and reasonable from all other points in the same territory.[3] A former special and preferred

rate is not a fair test of the reasonableness
[illegible] rate.[6] There is nothing illegal on wro
[illegible] railroad company making a rate for immig
as a class, and declining to give the same ra
[illegible] for whom different accommodations are
[illegible].[7] When the same carrier operates par
lines, and for any cause accepts low rates on on
them, it should provide sufficient corresponding
[illegible] to the patrons of the other line to pres
the substantial equality contemplated by the st
law.[8] This section does not render rates that
unreasonably low illegal in a sense that will aut
ize the Commission to prohibit their being ma
The fact that an independent pipe line transpo
oil between certain points at lower rates than
railroad company, constitutes no just reason w
the railroad company should be required to redu
its rates to those of the pipe line.[9] In England a
lowance is made for the liability assumed by th
carrier as an insurer.[9] So, a contract relieving th
carrier from liability for loss caused by delay
transit or by any other cause, in transporting per
ishable articles, in consideration of a reduced charg
for the carriage, has been held to be reasonable.
Where a railway company charged one rate for sep
arate packages containing the same article, all
which were billed to the same person at the same
place, and charged a higher rate upon similar pack
ages addressed to different persons, it was held that
h charges were not unreasonable, regard being
to the increased expense of handling the
els.[11]

oards of Trade v. Chicago, M. & St. P. R'y Co. 1 Inter. Com. C. 215;
ay Delinquencies," by W. L. Murfree Sr. 19 Am. Law Rev. 714.

2 **Martin v. Chicago, B. & Q. R. R. Co.** 2 Inter. Com. C. 25. And see ews v. Richmond & D. R. R. Co. 1 Inter. Com. C. 401.

3 **In re Tariffs of Transcontinental Lines,** 2 Inter. Com. C. 324.

4 **Myers v. Pennsylvania Co.** 2 Inter. Com. C. 573.

5 **Savery v. New York Central & H. R. R. Co.** 2 Inter. Com. C. 338

6 **Boards of Trade v. Chicago, M. & St. P. R'y Co.** 1 Inter Com. C. 215.

7 **In re Chicago, St. P. & K. C. R'y Co.** 2 Inter. Com. C. 231. Unreasonably low rates discussed by the commission: Report of the Commission, 2 nter. Com. C. 424. Cases in which rates have been held unreasonable by ie commission on particular facts: Farrar v. East Tenn. Va. & Ga. R'y Co. Inter. Com. C. 480 (lumber); Pyle v. East Tenn. Va. & Ga. R'y Co. 1 Inter. om. C. 465 (soap); Business Men's Ass'n v. Chicago & N. W. R'y Co. 2 nter Com. C. 73. Rate held reasonable on the facts: Myers v. Pennsylania Co. 2 Inter. Com. C. 573. As to the difficulty of determining what ro reasonable charges for railroad transportation, see Canada South. R'y Jo. v. International Bridge Co. 8 Fed. Rep. 190; Chicago & A. R'y Co. v. People 67 Ill. 11; Louisville & N. R. R. Co. v. Rail. Comm'rs, 19 Fed. Rep. 796. As to the constitutionality of statutes which leave to the determination of ury the question of whether charges are reasonable: Louisville & N. R'y Jo. v. Rail. Comm'rs, 19 Fed. Rep. 679; Stone v. Farmers' L. & T. Co. 116 U. S. 307, 336; Chicago & A. R'y Co. v. People, 67 Ill. 11.

8 **Rice et al. v. Western N. Y. & P. R. R. Co.** 2 Inter. Com. C. 389.

9 **Riley v. Horne,** 5 Bing. 217; Angell on Carriers, § 127. See Railroad Co. v. Brown, 8 App. Cas. 703; Ivatt on Carriers, 199.

10 **Manchester etc. R'y Co. v. Brown,** 8 Law R. App. Cas. 703; 53 Law J. Q. B. Div. 124; 50 Law T. N. S. 281; 32 Week. R. 207; 48 J. P. 388, reversing S. C. *sub. nom.* Brown v. Manchester, S. & L. R'y Co. 10 Law R. Q. B. Div. 250; 52 Law J. Q. B. Div. 132; 48 Law T. N. S. 473; 31 Week. R. 491; 47 J. P. 436.

11 **Baxendale v. Eastern etc. R'y Co.** 4 Com. B. N. S. 63; 27 Law J. C. P. 137.

1027. Cost of service.—One of the principal elements to be considered in determining what is a reasonable charge for the transportation of persons or property is the cost of performing the service.[1] The question is not what profit it may be reasonable to make, but what is a reasonable charge to the person who is charged.[2] A difference in cost in transporting similar articles in different packages will not justify a difference in charge.[3] Rates established by a railroad company in order to keep upon its line material for which the road has use, such as ties, or to keep the price low for its own advantage, cannot be justified.[4] The fact that a railroad company for many years has paid the charge

for hauling freight from wharves to its station does not bind it to continue that practice; it may stop doing so at any time, if not bound by contract.[5] A fair return upon the capital invested,[6] and the fair interests of the company, are to be considered.[7] A State statute fixing three cents per mile as the maximum to be charged for carrying passengers was held not unreasonable, in that it reduced the net income to 1½ per cent. on the original cost of the road, and to 2 per cent. on the amount of its bonded debt.[8]

1 Business Men's Ass'n v. Chicago & N. W. R'y Co. 2 Inter. Com. C. 73; Howell v. New York, L. E. & W. R. R. Co. 2 Inter. Com. C. 272; Louisville & N. R. R. Co. v. Railroad Comm'rs, 19 Fed. Rep. 679; Rice et al. v. Western N. Y. & P. R. R. Co. 2 Inter. Com. C. 389; Evans v. Oregon Ry. & Nav. Co. 1 Inter. Com. C. 325.

2 International Bridge Co. v. Canada South. R'y Co. 8 App. Cas. 723.

3 Diphrys etc. Co. v. Festiniog R'y Co. 2 Nev. & Mac. 73; Baxendale v. Eastern etc. R'y Co. 4 Com. B. N. S. 63; Rice v. Louisville & N. R. R. Co. 1 Inter. Com. C. 31; also, Rice's Case.

4 Reynolds v. Western N. Y. etc. R'y Co. 1 Inter Com. C. 333.

5 Providence Coal Co. v. Providence & W. R. R. Co. 1 Inter. Com. C. 107.

6 Louisville & N. R. R. Co. v. Rail. Comm'rs, 19 Fed. Rep. 679; Canada South. R'y Co. v. International Bridge Co. 8 Fed. Rep. 190.

7 Ransome v. Eastern Co's R'y Co. 1 Com. B. N. S. 437; 26 Law J. Com. P. 91; 1 Nev. & Mac. 63; Baxendale v. G. W. R'y Co. 5 Com. B. N. S. 336; 28 Law J. Com. P. 81; Nicholson v. G. W. R'y Co. 5 Com. B. N. S. 366; 28 Law J. Com. P. 89; 1 Nev. & Mac. 121.

8 Dow v. Beidelman (1888), 125 U. S. 680.

§ 1028. Distance as affecting rates. — Distance is not a controlling element in determining what is a reasonable rate, but there is ordinarily no better measure of railroad service in carrying goods than the distance they are carried, so, where the rate of freight charged over one line, on similar freight carried from neighboring territory to the same market, is considerably greater than over other lines for distances as long or longer, such

greater rate is held to be excessive.[1] But the circumstances may be so dissimilar as to make it lawful to charge more for the same distance on one line or branch than on another line or branch of the same road; in such case the burden is on the company making such departure to show its rates to be reasonable.[2] But without some proof of damage resulting to complainants, an advantage in rates as related to distance is not necessarily undue or unreasonable.[3] The principle that the ratio of rates should decrease with increase of distance is conceded, but modifying conditions often exist;[4] and distance by the shortest route is properly to be considered in determining the propriety of rates by a longer competing line.[5] Rates must be relatively fair and reasonable as between localities in essential respects similarly situated, having regard to the geographical and relative positions of the localities, so that one will not be favored to the unjust prejudice of the other.[6] The method of testing the freight rates of a railroad by the rate per ton per mile is not considered a controlling rule in determining the reasonableness of rates, because it ignores all other tests and fails to take into consideration any of the circumstances and conditions which enter into the making of a rate.[7] But this test is to be considered, and the advantages to be secured by its application to the transportation of goods continuously and for long distances, are protected by the act, and by the commission in enforcing it.[8] When the reasonableness of rates is in question, the charges made on long through lines cannot form a just basis for comparison with local rates for relatively

short distances.[9] The apportionment of rates to different parts of a through line does not determine the charge to the public, but may be significant on the question of reasonable rates for the whole distance.[10] When railroad companies make a through and continuous line and offer it for the use of the public, they cannot rid themselves of responsibility for unjust charges by breaking the haul in two and calling themselves carriers on the separate ends of their through line.[11] When a carrier, acting in good faith, has adopted an exceptional though not in itself an unreasonable rate, on a portion of its line, because that rate has been forced upon it by an independent and competing railroad not subject to the act, the reasonableness and justness of rates on other portions of the carrier's line, where no such conditions exist, cannot be measured, alone, by the standard thus furnished, but must be governed by considerations which fairly and justly apply to them.[12]

1 James v. East Tenn. Va. & Ga. R'y Co. 3 Inter. Com. C. 225.

2 Logan v. Chicago & N. W. R'y Co. 2 Inter. Com. C. 604.

3 Howell v. New York, L. E. & W. R. R. Co. 2 Inter. Com. C. 272.

4 Lincoln Board of Trade v. Burlington & M. R. R. Co. 2 Inter. Com. C. 147.

5 Lincoln Board of Trade v. Missouri Pacific R'y Co. 2 Inter. Com. C. 155.

6 Detroit Board of Trade v. Grand Trunk R'y of Canada, 2 Inter. Com. C. 315.

7 Business Men's Association v. Chicago, St. P. & O. R'y Co. 2 Inter. Com. C. 52; Business Men's Association v. Chicago & N. W. R'y Co. 2 Inter. Com. C. 73.

8 Farrar v. East Tenn. Va. & Ga. R'y Co. 1 Inter. Com. C. 480.

9 Crews v. Richmond & D. R. R. Co. 1 Inter. Com. C. 401; Martin v. Chicago, B. & Q. R. R. Co. 2 Inter. Com. C. 25; Farrar v. East Tenn. Va. & Ga. R'y Co. 1 Inter. Com. C. 480.

10 Brady v. Pennsylvania R. R. Co. 2 Inter. Com. C. 131.

11 Brady v. Pennsylvania R. R. Co. 2 Inter. Com. C. 131.

12 Business Men's Association v. Chicago etc. R'y Co. 2 Inter. Com. C. 52.

§ 1029. Proceedings to test reasonableness of rates.—Without further testimony than that afforded by a comparison between rates to particular points, the Commission will not declare a rate to one of such points unreasonable and unlawful.[1] The reasonableness of rates cannot be fairly determined in a proceeding to which some of the parties responsible for such rates are not parties.[2] Where a complaint is made to the Commission, against the reasonableness of through rates agreed upon by several connecting lines, it is necessary to make all of such connecting lines parties defendant.[3] When, pending a proceeding to test the reasonableness of rates, the rates are reduced and made satisfactory to the complainants, the Commission will not consider the question whether the rates before reduction were or were not excessive; that question having, by the reduction made, become purely abstract and speculative.[4] Such a course is particularly advisable and proper when it is apparent that other parties than the one complained of are interested in the question, and have not had the opportunity to be heard upon it.[5] The question whether rates paid ought to be refunded, having been presented to a judicial tribunal, where it is pending, the Commission will not take cognizance of it.[6]

1 Raymond v. Chicago, M. & St. P. R'y Co. 1 Inter. Com. C. 230; Business Men's Association v. Chicago & N. W. R'y Co. 2 Inter. Com. C. 73; Howell v. New York, L. E. & W. R. R. Co 2 Inter. Com. C 272.

2 New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R'y Co. 2 Inter. Com. C. 375.

3 Michigan Congress etc. Co. v. Chicago & G. T. R'y Co. 2 Inter. Com. C. 594, following Allen v. Louisville, N. A. & S. C. R'y Co. 1 Inter. Com. C. 199; Harwell v. Columbus & W. R. R. Co. 1 Inter. Com. C 237; Riddle, D. & Co. v. Pittsburgh & L. E. R. R. Co. 1 Inter. Com. C. 490.

4 Bishop v. Duval, 3 Inter. Com. C. 123; Pennsylvania Co. v. Louisville, N. A. & C. R'y Co. 3 Inter. Com. C. 223.

5 Pennsylvania Co. v. Louisville, N. A. & C. R'y Co. 3 Inter. Com. C. 223.

6 Bishop v. Duval, 3 Inter. Com. C. 128.

§ 1030. **Unjust discrimination forbidden.**—"SEC. 2. That if any common carrier, subject to "the provisions of this act, shall, directly or indirectly, "by any special rate, rebate, drawback, or other de- "vice, charge, demand, collect, or receive from any "person or persons a greater or less compensation "for any service rendered, or to be rendered, in the "transportation of passengers or property, subject to "the provisions of this act, than it charges, de- "mands, collects, or receives from any other person "or persons for doing for him or them a like and "contemporaneous service in the transportation of a "like kind of traffic under substantially similar cir- "cumstances and conditions, such common carrier "shall be deemed guilty of unjust discrimination, "which is hereby prohibited and declared to be un- "lawful."

In England it is settled that a common carrier is not obliged, at common law, to transport goods for all persons for the same compensation.[1] This rule has not, however, been generally accepted in this country. In a line of cases it is held that such charges must be equal to all, for the same service of transportation under like circumstances.[2] But a contract by a railroad company to pay a rebate upon all cotton shipped by certain persons, was adjudged not to be inequitable or against public policy.[3] As a public servant, a common carrier owes the same duty relatively to all shippers.[4] So, in New York it has been lately held that a rail-

road corporation cannot make an unreasonable or unjust discrimination between its customers in its freight charges.[5] A right conferred by charter to charge such sum as the company may see fit to make, is not contravened by a statute requiring charges to all persons to be equal.[6] At common law, railroad companies are only obliged to provide the public with reasonable express accommodations, and they need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business,[7] but they cannot contract to give one person a preference over another, as by giving one express company exclusive or superior facilities.[8] A charter right to fix rates, with discriminations "conducive to the interests of the road," is subject to the limitation that the discriminations shall be reasonable.[9]

1 Great Western R'y v. Sutton, Law R. 4 Eng. & Ir. App. H. L. 226. 237; Baxendale v. Eastern Co's R'y, 4 Com. B. N. S. 63; Branley v. South Eastern R'y Co. 12 Com. B. N. S. 63; Fitchburg R. R. Co. v. Gage, 12 Gray, 93. See 123 Mass. 326; 115 Mass. 422; Johnson v. Railroad Co. 16 Fla. 623; Ex parte Benson, 18 S. C. 33; Menacho v. Ward, 27 Fed. Rep. 529, 531; S. C. 23 Am. & Eng. R. R. Cas. 647. See Killmer v. Railroad Co. 100 N. Y. 395.

2 Railroad Co. v. Hill, 14 Bradwell (Ill. App.), 579; Messenge v. Penna. R. R. Co. 36 N. J. 407; S. C. 37 N. J. 531; Shipper v. Penna. R'y Co. 47 Pa. St. 338, 341; Cumberland etc. R. . Co's Appeal, 62 Pa. St. 218; Audenreid v. Philadelphia etc. R. R. Co. 68 Pa. St. 370; Chicago B. & Q. R. R. Co. v. Parks, 18 Ill. 460, 464; Chicago & A. R. R. Co. v. People, 67 Ill. 11 (1873); Scofield v. Railway Co. 43 Ohio St. 571 (1885); New Eng. Exp. Co. v. Maine C. R. R. Co. 57 Me. 188; Hays v. Penna. Co. 12 Fed. Rep. 309; State v. Nebraska Telephone Co. 17 Neb. 126; State v. Railway Co. 17 Neb. 647. And see specially, Atchison, T. & S. F. R'y Co. v. Denver & N. O. R. R. Co. 110 U. S. 667; Concord & P. R. R. Co. v. Forsaith, 59 N. H. 122; Paxon v. Illinois Central R. R. Co. 56 Iowa, 427.

3 Ex parte Benson, 18 S. C. 38. And see Cowdrey v. Railroad Co. 1 Wood, U. S. Cir. Ct. 331, 335.

4 Ayers v. Chicago etc. R'y Co. (1888), 71 Wis. 372; 5 Am. St. Rep. 226.

5 Root v. Long Island R. R. Co. 114 N. Y. 300; S. C. 2 Inter. Com. C. 576.

6 Railway Co. v. Sutton, Law R. 4 Eng. & Ir. App. 226; Baxendale v. Gt. Western R'y Co. 14 Com. B. N. S. 1; 16 Com. B. N. S. 137; Crouch v. Great Northern R'y Co. 9 Exch. 557.

7 Express Cases, 117 U. S. 1; 23 Am. & Eng. R. R. Cas. 545 and note; Sargent v. B. & L. R. R. 115 Mass. 416

8 Hutchinson on Carriers, § 207 *et seq.*; New England Exp. Co. v. Maine Cent. R. R. Co. 57 Me. 188; McDuffie v. P. & R. R. 52 N. H. 430; Sandford v. Railroad Co. 24 Pa. St. 378; Great Western R'y Co. v. Sutton, Law R. 4 Eng. & Ir. App. 226 (1869); Parker v. Great Western R'y Co. 3 R'y Cas. 5. (Exch.); Crouch v. Great Northern R'y Co. 9 Exch. 556; 11 Exch. 556, 742. For decisions upon the equality clauses in the English Acts, see Railway Co. v. Sutton, Law R. 4 Eng. & Ir. App. 238; London & N. W. R'y Co. v. Evershed, 3 Law R. App. Cas. 1029; 39 Law T. N. S. 306 H. L. Woodger v. Great Eastern R'y Co. 2 Nev. & Mac. 102; Branley v. South Eastern R'y Co. 12 Com. B. N. S. 63; Zuns v. South Eastern R'y Co. 4 Law R. Q. B. 539; 38 Law J. Q. B. 209; Lancashire R'y Co. v. Gidlow, Law R. 7 H. L. 517.

9 St. Louis etc. R'y Co. v. Hill, 14 Bradw. 579.

§ 1031. "**Similar circumstances and conditions.**"—The differences in circumstances and conditions are those relating to the nature and character of the service, and not to the business motives either of the shipper or carrier, or to other relations existing between them.[1] The act does not confer equal facilities upon connecting lines under dissimilar circumstances and conditions. All discriminations are not forbidden, but only such as are unjust, undue or unreasonable. The circumstances and conditions are to be considered in each case.[2] The words, "substantially similar circumstances and conditions," in some important particulars, define the rights and duties of both the carrier and the shipper. Such circumstances and conditions cannot be of the carrier's own creation, nor will they avail a carrier if they can be avoided by reasonably fair and just exertion. But if they are the effect of causes which are beyond the control of a carrier, and he is threatened with severe loss, as by the competition of a railroad not subject to the act, he will be justified in adopting exceptional rates—reasonable in themselves—for a portion of his line.[3] The Commission has decided that the fact that upon one route the terminal charges for handling petroleum were greater than upon another, constituted a

bstantial dissimilarity of the circumstances and nditions under which the business was transacted, d justified a difference in the freight charges.[4] mpetition by water transportation also constites a different circumstance or condition.[5] The rcumstance that the traffic furnished by one shipr is greater in volume than that furnished by anher does not constitute such a dissimilarity in rcumstances and conditions as will authorize a sser charge to the one than is made to the other.[6] A comparison of rates charged by railroad companies under circumstances and conditions substantially dissimilar prove nothing, and cannot be adopted as standards in arriving at the reasonableness and justness of rates.[7] At common law a common carrier may discriminate in favor of persons living at a distance from the end of the route, where the object is to secure freight which would otherwise reach its destination by a different route.[8] The English decisions hold that it does not constitute a difference in circumstances that goods are shipped to places to develop a new trade, or to open up new markets.[9] That the shipper contracts to furnish all his freight to the carrier favoring him does not warrant a reduction of rates to him.[10] Nor can a carrier discriminate against a shipper who refuses to patronize him exclusively.[11]

1 Great Western R'y Co. v. Sutton, Law R. 4 Eng. & Ir. App. 226 (H. L. 1869); Denaby etc. Co. v. Manchester etc. R'y Co. Law R. 11 App. Cas. 97. 120 (H. L. 1885).

2 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. Rep. 567. See Logan v. Chicago & N. W. R'y Co. 2 Inter. Com. C. 604.

3 Business Men's Ass'n v. Chicago etc. R'y Co. 2 Inter. Com. C. 52; Rend v. Chicago & N. W. R'y Co. 2 Inter. Com. C. 540.

4 Rice et al. v. Western New York and P. R. Co. 2 Inter. Com. C. 389.

5 Ex parte Koehler, 23 Fed. Rep. 529; 21 Am. & Eng. R'y Cas. 52; Munhall v. Pennsylvania R'y Co. 92 Pa. St. 150.

6 United States v. Tozer (1889), 2 Inter. Com. C. 540.

7 Business Men's Ass'n of Minnesota v. Chicago & N. W. R'y C Inter. Com. C. 7.

8 Ragan v. Aiken, 9 Lea (Tenn.), 609.

9 Derby etc. Co. v. Manchester etc. R'y Co. Law R. 11 App. Cs Ransom v. Penn. Co.'s R'y Co. (No. 1), 1 Nev. & Mac. 43; Oxley v. Eastern R'y Co. (No. 1), 1 Nev. & Mac. 72; 1 Com. B. N. S. 454; Hare Railway Co. 1 Nev. & Mac. 97.

10 Scofield v. Ry. Co. 43 Ohio St. 571; Baxendale v. Great West R'y Co. 5 Com. B. N. S. 336; Diphwys etc. Co. v. Festiniog R'y Co. 2 & Mac. 73; Jones v. Coal Co. v. N. B. R'y Co. 2 Nev. & Mac. 165.

11 Menacho v. Ward, 27 Fed. Rep. 529; Diphwys etc. Co. v. Festi R'y Co. 2 Nev. & Mac. 73.

§ 1032. "Devices"—Rebates—Like kind of traffic.—To render a preference of one shipper over another unlawful under the act, it is not necessary that it be accomplished by any "device." on the other hand, an advantage in freight rates cannot be given to one shipper over another, by means of a device, without rendering the carrier guilty of unjust discrimination, whereby it incurs the penalties prescribed by the act.[1] So, an offer by a railroad company to give a discount to any consignee who within a year should receive, at any one station, a specified amount of freight, the offer purporting to be made to secure speedy dispatch, but not so conditioned, was declared void, and it was said that if a discount is so made to one dealer, all others will be entitled to a like discount.[2] The classification of dried fruits and raisins, being products of the same State, in different classes, taxing different rates of freight, works an injustice to shippers. In all matters of classification clearness and simplicity should be aimed at, and irregularities and inconsistencies should be eliminated.[3] But it has been held in a State court that a common carrier may contract to ship freight at a lower rate than the published tariff, though he cannot

ıtract to deny the same reduced rate to other ppers; a contract by a railroad company, to ınt a rebate to the shipper of corn, being held not ɛgal, as being in violation of the law to prevent just discrimination.[4] So, in another State court was held that an agreement by a railroad company transport coal at a specified rebate from regular ıtes in consideration of the shipper's erecting a ock and coal-pockets on the company's land for se by both parties, is not void because of unıst discrimination against other shippers, especially vhere the shipper also agrees to do his own loading and to ship in large quantities.[5] The question whether certain devices and rebates constitute unjust discrimination under this section of the act is one of fact for the jury.[6] "Goods of like description and quantity," and "goods of the same description," are held not to refer to the contents of the parcels, but to the parcels themselves—that is, like or different for the purposes of carriage.[7] So cannel coal and splint coal are to be carried at equal rates.[8] An allegation that the respective freights were one car-load of ponies and one car-load of horses was held not sufficient to show them to be "like quantities of freight of the same class" under a State statute.[9] Special classification of lumber should be extended to railroad ties at the points in question.[10]

1 Schofield v. Lake Shore & Mich. S. R'y Co. 2 Inter. Com. C. 92.

2 Providence Coal Co. v. Providence & W. R. R. Co. 1 Inter. Com. C. 107.

3 Martin et al. v. Southern Pacific Co. et al. 2 Inter. Com. C. 1.

4 Christie v. Missouri Pac. R'y Co. (March, 1888), 94 Mo. 453; 2 Inter Com. C. 32.

5 Root v. Long Island R. R. Co. 114 N. Y. 300; S. C. 2 Inter. Com. C. 576.

6 Kentucky & Ind. Bridge Co. v. Louisville & N. R'y Co. 37 Fed. Rep. 657; Root v. Long Island R. R. Co. 2 Inter. Com. C. 576.

7 Gt. Western R'y Co. v. Sutton, Law R. 4 Eng. & Ir. App. 226.
8 Nitshill etc. Coal Co. v. Caledonian R'y Co. 2 Nev. & M. 39. And Merry v. Glasgow etc. R'y Co. 4 R'y & Can. Traf. Cas. 383.
9 Chicago B. & Q. R. R. Co. v. People, 77 Ill. 443. See Paxon v. Cent. R. R. Co. 55 Iowa, 427.
10 Thos. J. Reynolds v. Western New York & P. R'y Co. et al. Int. Com. C. 393.

§ 1033. **Differences in rates on different parts of railway.**—To constitute an undue or unreasonable preference by reason of an inequality in charge, it must be an inequality in the charge for traveling over the same line, or the same portion of the line.[1] Exceptional rates, made lower than other rates by a carrier on one portion of its line on account of competition, and in which it is itself without fault, under the operation of the act cannot be adopted as the standard as to other rates upon a distant portion of its line where no such exceptional conditions exist.[2] A discrimination in rates cannot be made by a railroad company on the ground that certain goods are to be carried to their final destination, by another route after reaching the terminus of the company's road;[3] or that certain goods have come by sea and others by rail.[4]

1 Caterham R'y Co. v. London etc. R'y Co. 1 Com. B. N. S. 410, 26 Law J. Com. P. 16; 1 Nev. & M. 32. And see Finnie v. South Western R'y Co. 2 Macq. 177; 23 Law T. 14; Attorney-General v. Bingham etc. R'y Co. 2 Eng. R'y Cas. 89; Murray v. Glasgow etc. Co. 11 Com. Sess. Cas. (4th Ser.) 25; 4 R'y & Can. Traf. Cas. 456. For construction of State statutes, see Spofford v. Boston & M. R. R. Co. 128 Mass. 326; Sargent v. Boston & L. R. R. Co. 115 Mass. 416; Sandford v. Railroad Co. 24 Pa. St. 378; Anderried v. Phila. & Reading R. R. Co. 68 Pa. St. 370; Railroad Co. v. Hill, 14 Bradw (Ill. App.) 579.

2 Business Men's Association of Minnesota v. Chicago & N. W. R'y Co. 2 Inter. Com. C. 73.

3 Twells v. Pennsylvania R. R. Co. 3 Am. Law Reg. N. S. 728.

4 Ransome v. Eastern Counties R'y Co. 1 Nev. & M. 63; 1 Com. B. N. S. 437. This subject is more fully considered under the "Long and Short Haul Clause," *post*, §§ 1054 *et seq.*

§ 1034. **Equality of rates and facilities.**—Unjust discrimination consists in the doing for or al-

ing to one party or place what is denied to ther; it cannot be predicated of an action which tself is impartial.[1] The act requires all charges de by a railway company for any service in the nsportation of passengers and property from one ate or territory into another, or for receiving, ivering, storing, or handling such property, to just and reasonable; and prohibits any discrimation in rates, charges, and facilities in favor of e connecting line, or against another, asking for ch equal rates and facilities for trade and travel, ual service, and from all points.[2] The selection either goods or customers is forbidden to common rriers, and the less desirable traffic which is ordiarily the subject of transportation, and not danerous to handle, must be accepted upon reasonable ms, as well as that which is more desirable.[3] A omplaint to the Commission for unjust discrimiation cannot be made to embrace cases which ocurred before the act was passed, even though they e similar to one which is complained of, and which arose afterward.[4] The question whether discrimination has been made is usually one of fact.[5] The courts have no power to make freight or passenger tariffs.[6] A carrier may be enjoined from illegally discriminating against a shipper because he refuses to enter into a contract to ship all his goods by that line.[7] In Texas, under the statute[8] declaring that, where a common carrier should refuse "to take and transport any passenger or property, or to deliver the same, or either of them, at the regular or appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit," a

carrier was held liable to a shipper for refusing goods, and afterward accepting those of another. Common carriers are required by the constitution of Minnesota to carry the productions of the country on equal terms;[10] and by the constitution of Georgia, railways are forbidden to pay, either directly or indirectly, any rebate or bonus, or to any act misleading the public as to the real rate charged or received for freight or passage.[11] Similar provisions are found in the constitutions of other States.[12]

1 Crews et al. v. Richmond & D. R. R. Co. 1 Inter. Com. C. 401; see articles by Adelbert Hamilton: "Discriminative Traffic Rates," 7 Law Rev. 818, and "Extortionate Traffic Rates," 16 Am. Law Rev.

2 Cutting v. Florida R'y & Nav. Co. 30 Fed. Rep. 363.

3 Riddle, Dean & Co. v. New York L. E. & W. R. R. Co. 1 Inter. Com. C. 594.

4 Ottinger v. Southern Pacific R. R. Co. 1 Inter. Com. C. 144.

5 Root v. Long Island R. R. Co. 114 N. Y. 300; S. C. 2 Inter. Com. C. 576.

6 Pensacola & Atl. R. R. Co. v. State (Fla. 1889), 1 Inter. Com. C.

7 De Menacho v. Ward, 23 Blatchf. 502; 27 Fed. Rep. 529.

8 Tex. Rev. Stat. art. 4227.

9 Houston & Texas Central R'y Co. v. Smith (1885), 63 Tex. 322.

10 Minn. Const. (1857) Art. X, § 4.

11 Ga. Const. (1877) Art. IV, §§ 2, 5.

12 Stimson's Am. Stat. Law (1886) § 465; Pa. Const. (1874) Art. XVII; Mo. Const. (1875) Art. XII, § 23; Ark. Const. (1874) Art. XVII, § 6; Co. Const. (1876) Art. XV, § 6; Cal. Const. (1873) Art. XII, § 21.

§ 1035. Lawful discrimination—Cost of service.—A difference in the cost of the service is a proper ground for a difference in charge; it constitutes a real difference in circumstances and conditions.[1] Such a difference occurs when return loads cannot be had, and cars have to be sent back empty;[2] when there is an advantage in the expense of loading or unloading;[3] when, by owning private side-tracks, cars may be returned more promptly;[4]

hen freight may be furnished in fully loaded rains at regular intervals;[5] when there is a marked ifference in grades;[6] when the distance is great, ince the expense of marshaling cars, starting rain, etc., is the same without reference to dis-ance;[7] when there is a difference in bulk, as com-pressed and uncompressed cotton.[8] The difference n rates should bear some proportion to the differ-ence in cost to the carrier;[9] otherwise, a case of undue preference would be made out.[10] A State statute classifying railroad corporations according to the length of their lines, and fixing a different limit of passenger rates in each class, is not a denial of equal protection of the laws under the fourteenth amendment of the United States constitution.[11]

1 Chicago & A. R. R. Co. v. People, 67 Ill. 11, 24; Denaby Main Colliery Co. v. Manchester etc. R'y Co. Law R. 11 App. Cas. 97 (H. L. 1885); S. C. 26 Am. & Eng. R. R. Cas. 253; Nicholson v. Great Western R'y (No. 1), 5 Com. B. N. S. 366; S. C. 1 Nev. & Mac. 121; Ransome v. Eastern Counties R'y Co. 1 Nev. & Mac. 63; 1 Com. B. N. S. 437; 26 Law J. Com. P. 91; Foreman v. Great Western R'y Co. 2 Nev. & Mac. 202; Nitshill etc. Coal Co. v Caledonian R'y Co. 2 Nev. & Mac. 39; Holland v. Festiniog R'y Co. 2 Nev. & Mac. 278. See Bellsdyke Coal Co. v. N. B. R'y Co, 2 Nev. & Mac. 105; Bell v. London etc. R'y Co. 2 Nev. & Mac. 185. See note to § 3, par. 1; Howell v. New York, L. E. & W. R. R. Co. 2 Inter. Com. C. 272; In re Louisville & Nashville R. R. Co. 1 Inter. Com. C. 31; Boston Chamber of Commerce v. Lake Shore & M. S. R'y Co. 1 Inter. Com. C. 436. See Report of Commission, 1 Inter. Com. C. 317.

2 Chicago & A. R. R. Co. v. People, 67 Ill. 24; Girardot v. Midland R'y Co. 4 R'y & Can. Traf. Cas. 291.

3 Chicago & A. R. R. Co. v. People, 67 Ill. 26.

4 Denaby etc. Co. v. Manchester etc. R'y Co. Law R. 11 App. Cas. 101-2.

5 Nicholson v. Great Western R'y Co. (No. 1) 5 Com. B. 366; 1 Nev. & Mac. 121.

6 Bellsdyke Coal Co. v. North B. R'y Co. 2 Nev. & Mac. 105; Nitshill Coal Co. v. Caledonian R'y Co. 2 Nev. & Mac. 39.

7 Ransome v. Eastern Co's R'y Co. 1 Nev. & Mac. 117, 63, 155. As to average weight of loads, see Girardot v. Midland R'y Co. 4 R'y & Can. Traf. Cas. 291.

8 Lotspeich v. Central R. R. Co. 73 Ala. 306; S. C. 18 Am. & Eng. R. R. Cas. 490.

9 Harris v. Cockermouth etc. R'y Co. 1 Nev. & Mac. 97, 102; 3 Com. B. N. S. 693; Garton v. Bristol etc. R'y Co. 1 Nev. & Mac. 227; 6 Com. B. N. S. 639, 655; WILLES, J., note to Nicholson v. Great Western R'y Co. (No. 1) 1 Nev. & Mac. 121, 142; Bell v. London etc. R'y Co. 2 Nev. & Mac. 185; and see the cases in note 1 to this section.

10 Denaby etc. Co. v. Manchester etc. R'y Co. Law R. 11 H. L. 7; Baxendale v. Railway Co. (Reading Case) 1 Nev. & Mac. 202, 211; Bell v. London etc. R'y Co. 2 Nev. & Mac. 185.

11 Dow v. Beidelman, 125 U. S. 680; S. C. Supr. Ct. Rep. 1022.

§ 1036. **The same subject, continued—Quantity of freight shipped.**—The cases in which the question whether a difference in the quantity of freight, shipped under one contract, constitutes a just cause for making a difference in charges, are not entirely harmonious, but from them we deduce the rule that there is a real difference between large and small shipments whenever they are shipped in such quantities or *under such conditions as to affect the cost of transportation.*[1] Such a difference has regard to the fair interests of the carrier,[2] and conforms to common business usages. But this rule does not apply where the *cost* of the service is not affected by the quantity of freight shipped; *e. g.*, the cost of transporting a ton of freight per week for a year is no less per ton than for transporting a ton per month for a year.[4] A contract, by which a railway company agreed to charge a rate of not less than two dollars and forty cents per ton to all shippers of less than one hundred thousand tons of coal per annum over its road, and to charge only one dollar and sixty cents per ton to all shipping a hundred thousand tons or over, was held to be void, as making so gross a discrimination as to violate public policy.[5] A railroad company cannot support a discount based on quantity of freight received by any one shipper, on the principles which are applied among merchants, whereby they give better prices in wholesale than in retail dealings.[6]

1 **Harris** v. Cockermouth etc. R'y Co. 1 Nev. & Mac. 97, 102-3. See Ransome v. Eastern Counties R'y Co. (No. 1), 1 Nev. & Mac. 63, 69, note (, par. 1.); London & N. W. R'y Co. v. Evershed, Law R. 3 App. Cas 1029, 1036.

2 Ransome v. Eastern Counties R'y Co. 1 Com. B. N. S. 437, 1.

3 Nicholson v. Great Western R'y Co. 5 Com. B. N. S. 366; 1 Nev. & Mac. 121; and Concord & P. R. R. Co. v. Forsaith, 59 N. H. 122.

4 As illustrating the text, see Hays v. Penna. Co. 12 Fed. Rep. 309; Scofield v. R'y Co. 43 Ohio St. 571; S. C. 23 Am. & Eng. Cas. 612, cited and approved in Missouri Pac. R'y Co. v. T. & P. R'y Co. 30 Fed. Rep. 2, 7 10; Girardot v. Midland R'y, 4 R'y & Can. Traf. Cas. 291; Sutton v. Great Western R'y Co. Law R. 4 H. L. Cas. 226.

5 Burlington, C. R. & N. R'y Co. v. Northwestern Fuel Co. 31 Fed. Rep. 652.

6 Providence Coal Co. v. Providence & W. R. R. Co. 1 Inter. Com. C. 107.

§ 1087. Competition.—It is well established that a railroad cannot, in order to compete with other lines which would naturally obtain the traffic of certain shippers, make a reduction in its rates to such shipper as compared with others.[1] In earlier cases it was held otherwise.[2] A threat of building a rival line, made by a shipper, is not a circumstance authorizing a lower rate to him.[3] The fact that, at one point, there is a competition by water transportation, constitutes a different circumstance or condition, as compared with another point where there is no such competition.[4] That a shipper may, or will, use another means of transportation will not justify an unequal charge.[5]

1 London & N. W. R'y Co. v. Evershed, Law R. 3 App. Cas. 1029 (1878); affirming S. C. *sub nom.* Evershed v. London and Northwestern R'y Co. 3 Law R. Q. B. Div. 134; 47 Law J. Q. B. Div. 284; 37 Law T. N. S. 623; 26 Week. R. 863—C. A.; which affirmed 2 Law R. Q. B. Div. 254; 46 Law J. Q. B. Div. 289; 36 Law T. N. S. 12; 26 Week. R. 102; Thompson v. London & N. W. R'y Co. 2 Nev & M. 115; Budd v. London etc. R'y Co. 36 Law T. N. S. 802; 4 R'y & Can. Traf. Cas. 393; Chicago & A. R. R. Co. v. People, 67 Ill. 11; In re Louisville & Nashville R. R. Co 1 Inter. Com. C. 31; Business Men's Association v. Chicago, St. P. etc. R'y Co. 2 Inter. Com. C. 52; New Orleans Cotton Exchange v. Cincinnati, N. O & Te. R'y Co. 2 Inter. Com. C. 375. See, also, an article by Mr. Adelbert Hamilton, 16 Am. Law Rev. 633, and Reports of the Commission, 1 Inter. Com. C. 261; Ib. 319; 2 Inter. Com. C. 30. For cases where the competition was held not sufficient, see Vermont State Grange v. Boston & Lowell R. R. Co. 1 Inter. Com. C. 159; Harwell v. Columbus & W. R'y Co. 1 Inter. Com. C.

235; Rayuana v. Chicago, Milwaukee & St. P. R'y Co. 1 Inter. Com. C. ; Boards of Trade v. Chicago, Milwaukee & St. P. R'y Co. 1 Inter. C. C. 215; Martin v. Southern Pac. Co. 2 Inter. Com. C. 1; Report of C. mission, 2 Inter. Com. C. 12; In re Chicago, St. P. & K. C. R'y Co. ter. Com. C. 231; Logan v. Chicago & N. W. R'y Co. 2 Inter. Com. C.

2 Foreman v. G. W. R'y Co. 2 Nev. & M. 202; WILLIAMS, J., in J. v. Eastern Counties R'y Co. 1 Nev. & M. 45, 46; CRESWELL, J. in L. some v. Eastern Counties R'y Co. 2 Nev. & M. 63, 70; COCKBURN, C. J. Harris v. Railway Co. 2 Nev. & M. 97, 103; Ex parte Koehler, 23 Fed. Re. 5. 3; Munhall v. Penna. R. R. Co. 92 Pa. St. 150.

3 Harris v. Cockermouth etc. R'y Co. 1 Nev. & M. 97; 3 Com. B. N. S. 693; Diphwys etc. Co. v. Festiniog R'y Co. 2 Nev. & M. 73.

4 Ex parte Koehler, 23 Fed. Rep. 529; 21 Am. & E. R'y Cas. 52 (under a State statute); Munhall v. Penna. R'y Co. 92 Pa. St. 150 (at common law.)

5 Evershed's Case, Law R. 3 App. Cas. 1029 (H. L. Cas.)

§ 1038. **Regulation of passenger traffic.**—The rule under which passenger transportation should be conducted requires absolute equality of payment from all persons enjoying the same accommodations.[1] Discrimination in passenger rates is not justified by proof that the carrier's business will be thereby stimulated, or that the settlement of the country tributary to it will be promoted, or that those receiving the more favorable rates are persons of small means who intend to locate permanently in the country.[2] Rates obtained from ticket brokers lower than those offered at the regular offices of a railway company effect unjust discrimination.[3] Party rates, and passenger car-load rates, lower than contemporaneous rates for single passengers, constitute discrimination, and are therefore illegal.[4] Mileage, excursion or commutation tickets must be offered impartially to all who accept the conditions on which they are issued; the act as well applies to these classes of tickets as to any others.[5] The fact that commercial travelers create freight traffic for the roads is no reason for giving them special rates as passengers.[6] There

no illegality in the selling of tickets with an agreement attached that in case the purchaser shall buy lands from the company, a part of the price of a ticket, or the whole of it, shall be allowed as part payment for the land;[7] but the sale of "Land Explorer's Tickets" and "Settler's Tickets" at less than the regular rates, as practiced by a Pacific railroad company, was held to be unjust discrimination.[8] A regulation of a railroad, that a passenger purchasing a ticket before entering the cars shall be entitled to a discount from the advertised rates, but if such a ticket is not purchased, the full rate of fare shall be charged, is a reasonable regulation.[9] Where there is no joint rate from a station on the line of one carrier to a station on another carrier's line, it is competent to name a through rate made up of the sums of rates prevailing on the several roads or parts of roads, made use of in the journey, using local rates, where there are no joint rates, and joint rates in combination with locals, where they are in effect for any part of the distance. When no joint rates are announced, local rates are employed in arriving at the through rate.[10]

1 Smith v. Northern Pacific R'y Co. 1 Inter. Com. C. 208. See article by Ward McAllister Jr., 2 Am. Law Rev. N. S. 186.

2 Smith v. Northern Pacific R'y Co. 1 Inter. Com. C. 208.

3 In re Passenger Tariffs and Rate Wars, 2 Inter. Com. C. 513.

4 In re Passenger Tariffs, 2 Inter. Com. C. 649.

5 In re Passenger Tariffs, 2 Inter. Com. C. 649.

6 Larrison v. Chicago & G. T. R. R. Co. 1 Inter. Com. C. 147.

7 Smith v. Northern Pacific R'y Co. 1 Inter. Com. C. 208.

8 Smith v. Northern Pacific R'y Co. 1 Inter. Com. C. 208.

9 Swan v. Railroad, 132 Mass. 116; Indianapolis etc. R. R. Co. v. Rinard, 46 Ind. 293; Hilliard v. Goold, 34 N. H. 230.

10 In re Passenger Tariffs, 2 Inter. Com. C. 649.

§ 1039. **Same subject, continued—Free pass—Equal accommodations.**—Where a person pa for one journey in two sections, under a mis prehension, thereby paying more than the throu rate, the mistake was corrected by a return of t excess, through the carrier was not at fault and h charged merely the regular rates for each part the journey.[1] A *prima facie* case of unjust discri ination is not made out by the mere exhibition two tickets, one of which the railroad compan has permitted to be transferred and the other not when the two are not similar.[2] This section of the act is held to prohibit the issuing of passes or free carriage to particular persons, and the exceptio permitted in favor of officers and employees of the company does not extend to the families of such persons.[3] Free transportation issued in the form of an annual pass to a person not in the regular service of the carrier, nor receiving any wages or salary under a contract of employment, but as compensation for throwing business in its way, is held to be illegal.[4] The constitution of Pennsylvania contains a prohibition against the issue of passes to any person other than officers and employees of the company,[5] and railways and transportation companies are forbidden by the constitutions of several States to furnish free passes or tickets, or to sell tickets at a discount to State or municipal officers or to members of the legislature.[6] Passengers, whether white or colored, paying the same fare upon the same railroad train, are entitled to equality of transportation, in respect to the character of the cars in which they travel, and the comforts and conveniences supplied.

heir being assigned to separate cars is not unlawful, if cars and accommodations equal in all respects are furnished to both, and the same care and protection observed.[7]

1 Sanger v. Southern Pacific Co. 5 Inter. Com. C. 134.

2 Ottinger v. Southern Pacific R. R. Co. 1 Inter. Com. C. 144.

3 Ex parte Koehler, 31 Fed. Rep. 315; Section 22 of the act, *infra*.

4 Slater v. Northern Pacific R'y Co. 2 Inter. Com. C. 359.

5 Pa. Const. (1874), Art. XVII, § 8.

6 Stimson's Am. Stat. Law (1886), 464; Mo. Const. (1875) Art. XII, § 24; Ark. Const. (1874) Art XVII, § 7; Cal. Const. (1873) Art. XII, § 19; Ala. Const. (1875) Art. XIV, § 23. In Missouri and California to accept a pass works a forfeiture of the office.

7 Heard v. Georgia R. R. Co. 1 Inter. Com. C. 428; Council v. Western & Atlantic R. R. Co. 1 Inter. Com. C. 339; Louisville, N. O. & Tex. Co. v. State (Miss. 1889), 2 Inter. Com. C. 615.

§ 1040. Obligation of railway company to supply suitable and sufficient cars.—It is a common-law and charter duty, of every railway subject to the act, to furnish proper car equipment for all the reasonable needs of the business it undertakes to do, and if it fails to do this, to the injury of the shipper, it is liable in damages therefor. The public has not undertaken to divide responsibility with the carrier in this respect.[1] The law does not forbid a railway from obtaining cars for use upon its own line from other carriers, or car-furnishing companies, but the rates of freight must be the same as they would be if such cars were owned by the railway using them.[2] A railway company may also obtain cars from a shipper; in such case, the shipper must not be allowed a different rate than that charged to others for the same service, but he is entitled to a proper rent for the use of his cars.[3] The terms upon which rolling-stock may be provided by shippers ought to be

uniform, and be published with the rate she they cannot be the subject of bargain, resulting varying rates to different shippers.[4] A rail company may make one rate to carry cattle, ar lower rate merely to furnish cars, and allow owner to take charge of them.[5] If, for any reas a railroad company cannot meet all calls for ca it should furnish them ratably and fairly to shippers, in proportion to the freights offered them; regular patrons are not entitled to pref ence.[6] It is the duty of the shipper to ascertai by inquiry of the proper agent of a railroa whether he can obtain cars for the shipment of freight, but if a railroad takes upon itself to gi such information and notice to some shippers, it its duty to give it to all.[7] Where a railroad com pany had a contract with a transportation compan by which the latter company furnished it with liv stock cars, which were more useful than ordinar stock cars in that they could be converted int coal cars when not in use as stock cars, the railroa company paying mileage for their use, and holdin them available to all shippers of stock, it was held on an application for *mandamus* to compel the rail road to ship relator's stock in such cars, that its re fusal to carry the stock therein at the same rate as for ordinary cars was not an unjust discrimination in favor of the transportation company, as the cir cumstances and conditions were not substantially similar.[8] Oil tanks affixed to car bodies are looked upon as parts of the cars; the charge for oil trans ported in them should be the same per hundred pounds as for oil carried in barrels.[9] Where it was shown that shipment of oil in barrels was danger-

.s, and that when the shipment was in tanks ıere was greater probability of obtaining return ads, the Commission equalized the difference in .tes, which was considerable, but permitted a ıarge for the weight of the barrels.[10] A railroad ›mpany which transports immigrants in unfit cars ·ill be required to provide better accommodations, nd to ascertain their fitness, the Commission will nake its own inspection.[11] A statute imposing a ›.nalty for "extortion or unjust discrimination" ›y railway companies as common carriers, does not nclude a failure or a refusal to supply cars, or to :arry freight.[12]

1 Scofield v. Lake Shore & Mich. S. R'y Co. 2 Inter. Com. C. 92. And see Rice v. Louisville & N. R. R. Co. 1 Inter. Com. C. 503.

2 Scofield v. Lake Shore & Mich. S. R'y Co. 2 Inter. Com. C. 92.

3 Scofield v. Lake Shore & Mich. S. R'y Co. 2 Inter. Com. C. 92.

4 Rice v. Louisville & N. R. R. Co. 1 Inter. Com. C. 503.

5 Kimball v. Rutland R. R. 26 Vt. 249; Manchester etc. R'y Co. v. Brown, Law R. 8 App. Cas. (H. L.) 703.

6 Riddle, Dean & Co. v. Pittsburg & L. E. R. R. Co. 1 Inter. Com. C. 374.

7 Riddle, Dean & Co. v. Baltimore & O. R. R. Co. 1 Inter. Com. C. 608.

8 United States v. Delaware L. & W. R. R. Co. 40 Fed. Rep. 101 (1889). See, also, Burton Stock Car Co. v. Chicago, B. & Q. R. R. Co. 1 Inter. Com. C. 132.

9 Rice v. Louisville & N. R. R. Co. 1 Inter. Com. C. 503.

10 In re Relative Tank and Barrel Rates on Oil, 2 Inter. Com. C. 365.

11 Savery & Co. v. New York Central & H. R. R. Co. et al. 2 Inter. Com. C. 336.

12 Bond v. Wabash S. L. etc. R'y Co. 67 Iowa, 712.

CHAPTER XLI.

UNDUE PREFERENCES.

§ 1041. Undue preferences prohibited.
§ 1042. Cost of carriage.
§ 1043. Preferences between localities.
§ 1044. Group rates.
§ 1045. Through rates.
§ 1046. Preferences to obtain business.
§ 1047. Equality in facilities—Order of shipment.
§ 1048. Preference by classification.
§ 1049. Equal facilities for the interchange of traffic.
§ 1050. Facilities for traffic—The English decisions.
§ 1051. Station facilities.
§ 1052. Interchange of traffic.
§ 1053. The same subject, continued—Exceptions to the general rule.

§ 1041. Undue preferences prohibited—General requirements of the section.—"SEC. 3, PAR. 1. "That it shall be unlawful for any common carrier "subject to the provisions of this act to make or "give any undue or unreasonable preference or ad- "vantage to any particular person, company, firm, "corporation, or locality, or any particular descrip- "tion of traffic, in any respect whatsoever, or to "subject any particular person, company, firm, cor- "poration, or locality, or any particular description "of traffic, to any undue or unreasonable prejudice "or disadvantage in any respect whatsoever."

This paragraph is virtually copied from the second section of the Railway and Canal Traffic Act of

54; the English decisions are therefore of peculiar lue in elucidating its provisions. A somewhat nilar provision in the constitution of Colorado s been held to impose no greater obligation on a ilroad company than that resting upon it by the mmon law.[1] What amounts to an undue prefence is a question of fact and not of law.[2] In etermining whether a preference shown by a railay company to one of its customers is undue or nreasonable, regard should be had to the benefit nd convenience of the public, and also to the conenience of the railway company with reference to ts general traffic.[3] This section forbids giving diferent rates to places named and those not named; o manufactured articles named and those not named; to jobbers at places named and those not named; to manufacturers and to jobbers and other dealers.[4] Distance is only one of the factors, and other material facts, such as character and quality of the commodity, cost of production, extent and nature of the competition in the business itself and by other transportation lines, and the interests of the public in the use of the commodity and its market cost, are to be considered.[5] Every one has a right to the natural advantages which arise from the proximity of his land to a railway, and a railway company is not justified in depriving him of it, by allowing to another not so favorably situated the expense incurred in connecting his place with the railway.[6] (1) "Any undue or unreasonable preference or advantage," within the meaning of this section, includes every form of unjust discrimination, not only in rates, (2) but also in the conveniences and facilities supplied to shippers in any

of the details of the carrying service.[7] A railway company may be guilty of undue preference in unequal charges for the use of its cars on other lines, and for demurrage for their detention.[8] A requiring a colored person, who paid first-class fare to ride in a car set apart for persons of color, and which was inferior in its appointments and comforts, to those set apart for white persons paying the same fare, was held to be an undue and unreasonable prejudice and a disadvantage, in violation of this section.[9]

1 Atchison, Topeka & Santa Fe R. R. Co. v. Denver & N. O. R. R. 110 U. S. 667.

2 Diphwys etc. Co. v. Festiniog R'y Co. 2 Nev. & Mac. 73; Watkins v. Wrexham etc. R. R. Co. 3 Nev. & Mac. R'y Cas. 5; Denaby Main Colliery Co. v. Manchester etc. Co. 3 Nev. & Mac. 441.

3 Lees v. Lancashire etc. R'y Co. 1 Nev. & Mac. 352.

4 In re Tariffs of the Transcontinental Lines, 2 Inter. Com. C. 321.

5 Imperial Coal Co. et al. v. Pittsburgh & L. E. R. R. Co. et al. 2 Inter. Com. C. 618.

6 Harris v. Cockermouth & Worthington Railway Company, 3 Com. N. S. 633; 4 Jur. N. S. 239; 27 Law J. Com. P. 162; 1 Nev. & Mac. Ransome v. Eastern Counties R'y Co. (No. 2) 4 Com. B. N. S. 135; 4 Jur. N. S. 282; 27 Law J. Com. B. 165; 1 Nev. & Mac. 109. So, too, a producer is entitled to sell his product in the best available market: Reynolds v. Western N. Y. & P. R'y Co. 2 Inter. Com. C. 393.

7 Morris v. Delaware, L. & W. R. R. Co. 2 Inter. Com. C. 617. See also, Denaby etc. Co. v. Manchester etc. R'y Co. Law R. 11 App. Cas. London & North Western R'y Co. v. Evershed, Law R. 3 App. Ca. 1029; Macfarlane v. R'y Co. (No. 2) 4 R'y & Can. Traf. Cas. 269; Aberdeen v. Great Northern etc. R'y Co. 3 Nev. & Mac. 205.

8 Diphwys etc. Co. v. Festiniog R'y Co. 2 Nev. & Mac. 73.

9 Heard v. Georgia R. R. Co. 1 Inter. Com. C. 428.

1042. Cost of carriage.—In determining the question whether a lower mileage rate, as compared with a higher, is or is not an undue advantage, it is necessary to consider whether either traffic can be carried at a less cost to the railway company than the other, and whether either traffic is under different conditions as regards competition

f routes or other special circumstances.[1] A railroad company properly regards its own interest *if t charges for its services in proportion to their necessary cost*, and has only such a variation in its rates as there is in the circumstances of its customers affecting the cost of conveyance.[2] So, a lesser rate to one shipper than to another is held to be justifiable where there are circumstances which render the cost to the company of carrying for the one less than the cost of carrying for the other.[3] Through rates should not be made so low as to burden other business with part of the cost of the business upon which it is imposed.[4] Proof that certain rates are very profitable to the road, and that they are higher than the rates charged on certain other somewhat similar commodities, is not of itself a sufficient ground for determining either that such rates are unjust, or what rates would be just and reasonable for the traffic in question.[5] Where a railway company, in order to introduce certain coal and coke into a new territory, made special and lower rates thereon with certain merchants, it was held that the lower rates gave the traffic an undue preference.[6] A difference in the grades of branches of a railway which make a difference in the cost of operating them, warrants a different mileage rate upon the branches.[7]

1 Broughton etc. Coal Co. v. Great Western R'y Co. 4 Ry. & Can. Traf. Cas. 191; Rice, Robinson & Witherop v. Western, N. Y. & Penna. R. R. Co. 2 Inter. Com. C. 389; In re Louisville & N. R. R. Co. 1 Inter. Com. C. 31; Boston Chamber of Commerce v. Lake Shore & M. S. R'y Co. 1 Inter. Com. C. 436; Evans v. Oregon R'y & Nav. Co. 1 Inter. Com. C. 325; Report of Commission, 1 Inter. Com. C. 317.

2 Bellsdyke Coal Co. v. N. B. R'y Co. 2 Nev. & Mac. 105.

3 Oxlade v. Northeastern R'y Co. (No. 1), 1 Com. B. N. S. 454; 3 Jur. N. S. 637; 26 Law J. Com. P. 129; 1 Nev. & Mac. 72.

4 Lippman & Co. v. Illinois Central R. R. Co. 2 Inter. Com. C. 534.

5 Howell et al. v. New York, L. E. & W. R. R. Co. et al. 2 Inter. Com. C. 272.

6 Oxlade v. Northeastern R'y Co. (No. 1), 1 Com. B. N. S. 454; 2 N. S. 637; 26 Law J. Com. P. 123; 1 Nev. & Mac. 72.

7 Nitshill etc. Coal Co. v. Caledonia R'y Co 2 Nev. & Mac. 39.

§ 1043. **Preference between localities.**—The spirit and purpose of this section require that where the circumstances and conditions will fairly admit of it, the charges to all points for a like service should be made relatively equal.[1] This purpose would be defeated if one carrier, by making unreasonably low rates to any locality, would enable other carriers competing with it to make greater charges upon the shorter hauls to other stations than were made over the same line in the same direction to the same locality.[2] A rate from one locality lower than that enjoyed by another, where the circumstances are the same, tenders a preference or advantage to the first, unless it can be justified upon some sound and substantial ground. To furnish facilities to one town to ship goods to market and deprive another competing town thereof, is an unjust preference.[4] Where relative rates are the same at points not far distant from each other on the same system of railroads, it is proper to consider the bearings and relative equality of rates at all of the points so situated, in order to avoid preference to one and prejudice to another.[5] The fixing of charges upon different divisions or branches of a railroad in order to force business and divert trade to one locality which would naturally, under equitable rates, go to another, constitutes undue preference, and is not excused by the fact that the charges are not voluntary, but result from competition with other carriers.[6] Low charges upon one of two routes operated by the same carrier

uld not be made up by high charges upon the er, when the result disastrously affects the busi- s of communities situated upon the latter line.[7] unicipal subscriptions or gratuities in aid of rail- ds do not affect the question of undue prefer- ce.[8] A distributing center cannot demand as a tter of right that the rates from a common rce of supply to more distant and smaller towns, all be the sum of the rate to itself and the rate ence to such smaller towns; but the carriers may ake rates from the common source of supply to e smaller towns directly, and if less than the rate demanded it is not for that reason objectionable;[9] ut in England, where a railway company issued re- urn tickets to stations a certain distance only own their line, the court refused to enjoin them o issue such tickets to more distant stations.[10] A ailroad company may equalize its rates as between small and large towns, even though the effect be prejudicial to the large towns, which before had been specially favored.[11] Impartial rates are not rendered illegal by their effect upon the business of localities.[12]

1 Crews et al v. Richmond & D. R. R. Co. 1 Inter. Com. C. 401; Logan v. Chicago & N. W. R'y Co. 2 Inter. Com. C. 604; In re Chicago, St. P. & K. C. R'y Co. 2 Inter. Com. C. 231; Ayr Harbor Trustees v. Glasgow R'y Co. 4 R'y & Can. Traf. Cas. 90.

2 In re Chicago, St. P. & K. C. R'y Co. 2 Inter. Com. C. 231.

3 In re Tariff of Transcontinental Lines, 2 Inter. Com. C. 324.

4 Hozier v. Caledonian R'y Co. 17 Sess. Cas. 332; 1 Nov. & Mac. 27, 30; and see Jones v. Eastern Counties R'y Co. 3 Com. B. N. S. 718; 1 Nov. & Mac. 45; Richardson v Midland R'y Co. 4 R'y & Can. Traf. Cas. 1; Girardot v. Midland R'y Co. 4 R'y & Can. Traf. Cas. 391.

5 In re Petition of The Produce Exchange of Toledo, 2 Inter. Com. C. 538.

6 Raymond v. Chicago, M. & St. P. R'y Co, 1 Inter. Com. C. 230; Providence Coal Co. v. Providence & N. R. R. Co. 1 Inter. Com. C. 106.

7 Boards of Trade Union of Farmington etc. v. Chicago, M. & St. P. R. R. Co. 1 Inter. Com. C. 215.

8 Lincoln Board of Trade v. Burlington & M. R. R. Co. et al. 2 Inter. Com. C. 147.

9 Martin et al. v. Chicago, B. & Q. R. R. Co. et al. 2 Inter. Com. C. 25. See, also, Lincoln Board etc. v. Burlington & M. R. R. Co. 2 Inter. Com. C. 147.

10 Caterham R'y Co. v. Railway Co. 1 Nev. & Mac. 32; 1 Com. B. S. 410.

11 Crows et al. v. Richardson & D. R. R. Co. 1 Inter. Com. C. 494. Lincoln Board etc. v. Missouri Pac. R'y Co. 1 Inter. Com. C. 155.

12 Martin et al. v. Chicago, B. & Q. R. R. Co. et al. 2 Inter. Com. C. 25. Effect of the act upon cities discussed by the commission in Second Annual Report, 2 Inter. Com. C. 443

§ 1044. **Group rates.**—By this term is meant uniform rate from or to all points within a prescribed district; or for all persons engaged in the same business within a particular district. Group rates may be properly made from a large number of mines practically composing a coal-mining district, extending to two or more States, the distance from each part of the group by some route being substantially a fair equivalent of the distance from other points, and the commercial necessities being substantially the same for all.[1] A group rate for a particular district, intended to place producers in the district upon an equality among themselves, and with producers of the same commodity from other districts, all competing in a common market, is not unlawful merely on account of differences in the geographical location of different producers.[2] The commission has decided that a reduction which will throw into confusion an adjustment of rates over a large section of country, which are not claimed to be unreasonable of themselves, should not be required, without a clear right thereto exists under some direct provision of the law.[3] The transportation of milk being a peculiar kind of traffic, in which time is of the first im-

rtance, and in which the consumers as well as e producers have special interests, group rates r large areas of grazing lands were readily up-ld by the commission.[4] In England, it was held, on the application of a coal company which aimed that group rates were unfair and injurious to its business, that the grouping system, as it ffected the applicants, subjected them to an undue nd unreasonable prejudice and advantage, and vas not authorized.[5]

1 Rend v. Chicago & N. W. R. R. Co. 2 Inter. Com. C. 540; 2 Inter. Com. C. 313. And see Report of the Commission, 1 Inter. Com. C. 316; La Crosse M. & J. Union v. Chicago, Mil. & St. P. R'y Co. 1 Inter. Com. C. 629.

2 Imperial Coal Co. et al. v. Pittsburg & L. E. R. R. Co. et al. 2 Inter. Com. C. 618.

3 Rend v. Chicago & N. W. R. R. Co. 2 Inter. Com. C. 540.

4 Howell v. New York, L. E. & W. R. R. Co. 2 Inter. Com. C. 272.

5 Denaby M. Colliery Co. v. Manchester S. & L. R'y Co. 3 Nev. & Mac. 426, the leading English case upon this subject. See, also, Ransome v. Eastern Counties R'y Co. 4 Com. B. N. S. 135; 4 Jur. N. S. 282; 27 Law J. Com. P. 166; 1 Nev. & Mac. 109; Ransome v. Eastern Counties R'y Co. (No. 4) 8 Com. B. N. S. 709; 7 Jur. N. S. 99; 29 Law J. Com. P. 329; 8 Week. R. 527; 2 Law T. N. S. 376; 1 Nev. & Mac. 155; Broughton & Plas. P. C. Co. v. Great Western R'y Co. 4 R'y & Can. Traf. Cas. 203; Skinningrove Iron Co. v. Northeastern R'y Co. 5 R'y & Can. Traf. Cas. 244.

§ 1045. **Through rates.**—A railroad company is under special obligation to give reasonable rates for its local business, but there are many influences which may affect through rates while not bearing upon local rates.[1] Through rates are not to be compared with ordinary local charges,[2] and a company in fixing its local rates ought to consider its through rates.[3] A rate is none the less a through rate when freight is shipped upon a through bill of lading, because the initial carrier charges its local rate as part of the total rate and the remaining lines charge an agreed rate made by percentages.[4]

Through rates are not necessarily illegal, wh... when divided between carriers, give them less t... their local rates, *provided* that the through rate ... self is not less than some one of the locals, or ... justly discriminating against individuals or loc... ties, or so low as to burden other business w... part of the cost of the business upon which it ... imposed.[5] The proportions of through rates alo... the same lines should be so adjusted as to be rea... onable in amount and properly guarded in the application, and so as not to injure busines... in one locality in order that it may be stimulate... in another.[6] The fact that a railroad compan... makes through joint arrangements for one of its branch roads, will not render it incompetent ... make identical arrangements on other parts of its system, when it appears that from such other part... it makes through arrangements by a more direct route, and at the same rates which are presumptively of equal convenience to shippers.[7] A refusal to give a through rate as for one shipment, though it operates prejudicially to the town desiring the privilege and favorably to another town, is not unjust discrimination when the carrier applies the same rule to all towns, and accords the privilege to none.[8] Through rates and through bills of lading given on other commodities and to other points similiarly situated should also be given on cotton, unless a reasonable excuse is shown for refusing it.[9] Where one road is operated by another, the operating company is required to afford equal facilities as to through business, and must not fix the rates upon the two lines so as to favor its own line at the expense of the other.[10] Nor can a rail-

ıd company which operates a part of a through ıe, and owns a controlling interest in the capital ɔck of another company by which the other part operated, free itself from the responsibility of ɔcessive through rates by getting behind the corɔrate existence of the other company as a separate ırrier.[11] Under the English act it is held that railway company is not bound to extend to ther steamboats the same facilities as to through ates, etc., as it extends to the steamboat it selects o transact its business.[12] Whether a difference ɔetween a local rate between two points on a raiload, and its proportion of the through rate, is an ındue and unreasonable preference, is a question for the jury.[13]

1 Lippman & Co. v. Illinois Central R. R. Co. 2 Inter. Com. C. 584.

2 Hull, Barnsley & W. R. J. R'y & D. Co. v. Yorkshire & D. C. & I. Co. 18 Q. B. Div. 761; 3 Times Law R. 451.

3 Londonderry Harbor Comm'rs v. Great N. R'y Co. (Ir.) 5 B. & Mac. 282 14 Rep. R'y Com. 23. And see Lloyd v. Northampton etc. R. R. Co. 3 Nev. & Mac. 239.

4 Chamber of Commerce of Milwaukee v. Flint & P. M. R. R. Co. 2 Inter. Com. C. 553. Local and through rates considered: Martin v. Chicago, B. & Q. R. R Co. 2 Inter. Com. C. 25; Chamber of Commerce of Milwaukee v. Flint & P. M. R. R. Co. 2 Inter. Com. C. 553.

5 Lippman & Co. v. Illinois Central R. R. Co. 2 Inter. Com. C. 584; Detroit Board of Trade v. Grand Trunk R'y Co. of Canada, 2 Inter. Com. C. 315.

6 Chamber of Commerce of Milwaukee v. Flint & P. M. R. R. Co. 2 Inter. Com. C. 553.

7 In re Joint Water and Rail Lines, 2 Inter. Com. C. 645.

8 Crews et al. v. Richmond & D. R. R. Co. 1 Inter. Com. C. 401.

9 Harwell v. Columbus & W. R. R. Co. 1 Inter. Com. C. 237. See Cowan v. Bond (U. S. Cir. Ct. Dist. of Miss. 1889), 2 Inter. Com. C. 542.

10 Clonmel Traders v. Waterford R'y Co. 4 R'y & Can. Traf. Cas. 92.

11 Brady et al. v. Pennsylvania R. R. Co. et al. 2 Inter. Com. C. 131.

12 Napier v. Glasgow etc. R'y Co. 1 Nev. & Mac. 292; 4 Sea. Cas. 87 (3rd Ser).

13 United States v. Tozer, 39 Fed. Rep. 369.

§ 1046. **Preferences to obtain business.**—It has been held in England that a preference with respect

to certain goods given by a railway compe
certain individuals, in consideration of their
tracting to have all such goods consigned th
the railway, and not by water or other mea
an undue preference, *unless it be clearly shown
it is done in order to prevent a competition w
railway, or that there is secured thereby to the
pany such an amount of traffic as to compensa
making the reduced rate.*[1] A reduction of rat
a shipper in consequence of his threat to cons
another railway, which would be a competitor
an undue preference by the railway company.[2]
also, is a reduction made for the purpose of
couraging the construction of a competing li
A railway company cannot lawfully give prefer
rates of freight to certain members of a gene
class of customers, unless the cost of the service
less in their cases than to the class generally;
mere desire to attract their business from anoth
line, especially if the preference is prejudicial
others in the same trade, will not justify such pre
erence.[4] The gratuitous carriage of goods, or th
allowance of a rebate to a shipper, for the purpo
of competing with rival railway lines,[5] or with ca
riage by sea,[6] is held to be an undue preference.
In determining whether a regulation of a railway
company operates as an undue preference or a van
tage, the fair interests of the company are to be
taken into account.[7] A preference as to one class
of goods cannot be justified because the shipper en
gages to employ other lines of the same company
in the transportation of other classes of goods.[8]
Nor is it a valid consideration for a reduced rate
that the party favored is a customer also of the

e railway company in goods of a different kind.[9] s not a legitimate ground of discrimination that shipper contracts to furnish all his freight to carrier;[10] nor can a carrier discriminate against ipper who refuses to patronize him exclusively.[11]

Garton v. Bristol etc. R'y Co. 1 Nev. & Mac. 218; 6 Com. B. N. S. 28 Law J. Com. P. 306.

Harris v. Cockermouth & Workington R'y Co. 3 Com. B. N. S. 633; ar. N. S. 239; 27 Law J. Com. P. 162; 1 Nev. & Mac. 97; Diphwys v. tiniog R'y Co. 2 Nov. & Mac. 73.

3 Diphwys v. Festiniog R'y Co. 2 Nev. & Mac. 73; Scofield v. R'y Co. Ohio St. 571; Baxendale v. Great Western R'y Co. 5 Com. B. N. S. 309; nacho v. Ward, 27 Fed. Rep. 529.

4 Thompson v. London etc. R'y Co. 2 Nev. & Mac. 115.

5 London & N. W. R'y Co. v. Evershed, Law R. 3 App. Cas. 1029.

6 Budd v. London & N. W. R'y, 35 Law T. N. S. 802; 25 Week. R. 752; R'y & Can. Traf. Cas. 393.

7 Ransome v. Eastern Counties R'y Co. (No. 1) 1 Com. B. N. S. 437; 26 aw J. Com. P. 91; 1 Nev. & Mac. 63; Nicholson v. Gt. Western R'y Co. 1 ev. & Mac. 121; S. C. 5 Com. B. N. S. 336; Leas v. Lancashire etc. R'y o. 1 Nev. & Mac. 352.

8 Baxendale v. Great Western R'y Co. (Bristol case) 5 Com. B. N. S. 309; Nev. & Mac. 161; 28 Law J. Com. P. 69; 4 Jur. N. S. 1241. See Scofield v. ake Shore & Mich. So. R. R. Co. 43 Ohio St. 571; Twells v. Pennsylvania l. R. Co. 3 Am. Law Reg. (N. S.) 728.

9 Bellsdyke Coal Co. v. North British R'y Co. 2 Nev. & Mac. 105.

10 Scofield v. Railway Co. 43 Ohio St. 571; Baxendale v. G. W. R'y Co. 5 Com. B. N. S. 309; Diphwys etc. Co. v. Festiniog R'y Co. 2 Nev. & Mac. 73.

11 Menacho v. Ward, 27 Fed. Rep. 529; Diphwys etc. Co. v. Festiniog R'y Co. 2 Nev. & Mac. 73.

§ 1047. **Equality in facilities—Order of shipment.**—Every common carrier whose lines are intersected by the tracks of any railway, is entitled to demand of such intersecting railway the same reasonable, proper and equal facilities for the interchange of traffic, and for the receiving, forwarding and delivering of its freight, that may be lawfully demanded by other carriers.[1] It is no good reason for refusal to afford to a common carrier the customary reasonable and equal facilities for the interchange of traffic, that it supplies no

public necessities, the public having been fully accommodated without it. All railroads created must be conclusively presumed to be public conveniences, and other common carriers cannot refuse to exchange traffic with them on any suggestion or showing to the contrary.[2] A railroad passing through a town unjustly discriminates against it by placing its depot a mile and a half distant, at its junction with another road.[3] When a railroad company has fixed its rates for the transportation of grain from a given station to a city, a charge of different rates for delivering grain to different warehouses in the city, being on the line of its track, is not lawful.[4] The same principle applies to the delivery of cattle at stock-yards.[5] Regulations favoring a particular agent for the delivery of goods consigned to persons in a town have been held to be an undue preference of such an agent, under the English act.[6] So, also, in England, regulations which favor a particular agent for the reception of freight are considered an undue preference as to him.[7] And so as to arrangements with proprietors of omnibuses and other vehicles for the delivery of passengers.[8] As a general rule goods should be shipped by a railroad in the order of their receipt, but the rule is not inflexible; if, for good cause and in good faith, the order of receipt is not strictly followed, it will incur no liability.[9] On the other hand it cannot delay the transportation of goods already delivered and awaiting shipment, in order to receive and forward other goods.[10] It may have regard to the character and condition of the goods, and is not bound to send them for-

rd in the order of their receipt without refer-ce to such facts.[11]

1 Kentucky and Indiana Bridge Co. v. Louisville & Nashville R. R. 2 Inter. Com. C. 162; Heck v. East Tennessee etc. R. R. Co. 1 Inter. Com. 495; Chicago & Alton R. R. Co. v. Pennsylvania Co. 1 Inter. Com. 86.

2 Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. R. Co. nter. Com. C. 162.

3 State v. Republican V. R. Co. 17 Neb. 647; affirmed on rehearing, Neb. 512. See State v. Chicago etc. R. R. Co. 19 Neb. 476.

4 Vincent v. Chicago & A. R. R. Co. 49 Ill. 33.

5 McCoy v. Chicago, J. St. L. & C. R. R. Co. 13 Fed. Rep. 3; Coe v. ouisville & N. R. R. Co. 3 Fed. Rep. 775; Keith v. Kentucky Central R. . Co. 1 Inter. Com. C. 189.

6 Parkinson v. Great Western R'y Co. 40 Law J. Com. P. 222; 6 Law R. om. P. 574; 24 Law T. N. S. 830; 19 Week. R. 1063; 1 Nev. & Mac. 280; and ee Fishbourne etc. v. Great Southern & W. R'y Co. 2 Nev. & Mac. 224; Vannan v. Scottish Cent. R'y Co. 2 Sess. Cas. 1373 (3rd Ser.); 1 Nev. & Mac. 37; Pickford v. Caledonia R'y Co. 1 Nev. & Mac. 252; 4 Sess. Cas. 755 (3rd ier.); Palmer v. London etc. R'y Co. 1 Nev. & Mac. 271; 6 Law R. Com. P. 94; 40 Law J. Com. P. 133; 24 Law T. N. S. 135; 19 Week. R. 627. See Palmer v. London etc. R'y Co. 1 Nev. & Mac. 243; 1 Law R. Com. P. 588; 12 Jur. N. S. 926; 25 Law J. Com. P. 256; 12 Week. R. 11; 15 Law T. N. S. 159. See, also, note, 1 Nev. & Mac. 279; Cooper v. Southeastern R'y Co. 4 Com. B. 738; 27 Law J. Com. P. 324; 1 Nev. & Mac. 185; Robertson v. Mid-land etc. R'y Co. 2 Nev. & Mac. 409; Bell v. London etc. R'y Co. 2 Nev. & Mac. 185.

7 Baxendale v. Bristol etc. R'y Co. 11 Com. B. N. S. 787; 1 Nev. & Mac. 229; Baxendale v. North Devon R'y Co. 3 Com. B. N. S. 324; 1 Nev. & Mac. 180.

8 Marriott v. London etc. R'y Co. 1 Com. B. N. S. 499; 3 Jur. N. S. 493; 26 Law J. Com. P. 154; 1 Nev. & Mac. 47; Beadell v. Eastern Counties R'y Co. 26 Law J. Com. P. 250; 2 Com. B. N. S. 509; 1 Nev. & Mac. 56; Painter v. London etc. R'y Co. 2 Com. B. N. S. 702; 1 Nev. & Mac. 58; Ilfracombe etc. Co. v. London etc. Co. 1 Nev. & Mac. 61.

9 Galena & Chicago Union R. R. Co. v. Rae (1857), 18 Ill. 488.

10 Great Western R. R. Co. v. Burns, 60 Ill. 284.

11 Peet v. Chicago R. R. Co. 20 Wis. 594.

§ 1048. **Preference by classification.** — Rates and charges, not unreasonably high of themselves, can be so adjusted in their relations to each other, as to give an undue preference and produce unreasonable advantage.[1] Analogous articles are entitled to the same classification. So, where a classification which puts lumber in car-load lots in the sixth class, and unfinished wagon materials in the fifth class, it was held that hub blocks, upon which

only so much labor had been expended as was ful to put them in condition for seasoning. s be regarded as the raw material, and to be p when not otherwise specified, in the classifi with lumber, instead of with unfinished w materials.[2] Applying this principle, the Co sion has exercised its power by ordering a par lar kind of soap to be placed in a particular c Rates obtained by combination, which produ lower rate than the tariff calls for, are unjust cause they enable an intelligent shipper to ob an advantage over one who has less informat and they are illegal because they show two rate the same point, over the same line, at the sa time.[4] A classification is put before the public general information; it is supposed to be expres in plain terms, so that the ordinary business ma can determine for himself what he can lawfully b charged for transportation. The persons who pr pare it have no more authority to construe it tha anybody else, and must leave it to speak for itself

1 Raymond v. Chicago, M. & St. P. R. R. Co. 1 Inter. Com. C. 2 See In re Underbilling, 1 Inter. Com. C. 633: Report of the Commissio Inter. Com. C. 302, 312.

2 Hurlburt v. Lake Shore & M. S. R'y Co. 2 Inter. Com. C. 122; Hur burt v. Pennsylvania R. R. Co. 2 Inter. Com. C. 130.

3 James Pyle & Sons v. East Tennessee, Va. & Ga. R. R. Co. 1 Inter Com. C. 465.

4 Martin et al. v. Southern Pacific Co. et al. 2 Inter. Com. C. 1.

5 Hurlburt v. Lake Shore & M. S. R'y Co. 2 Inter. Com. C. 122; Hur burt v. Pennsylvania R. R. Co. 2 Inter. Com. C. 130.

§ 1049. **Equal facilities for the interchange of traffic.**—"SEC. 3, PAR. 2. Every common carrier "subject to the provisions of this act shall, accord- "ing to their respective powers, afford all reason- "able, proper, and equal facilities for the inter-

nge of traffic between their respective lines, l for the receiving, forwarding, and delivering passengers and property to and from their eral lines, and those connecting therewith, and all not discriminate in their rates and charges tween such connecting lines, but this shall not construed as requiring any such common carer to give the use of its tracks or terminal facilies to another carrier engaged in like business."

This paragraph follows closely the provisions of clauses of the English act.[1] It does not pose upon carriers the duty of forming new nections, or of establishing new freight stan s; they have full discretion as to making tensions of their lines, of forming connections, d of establishing depots.[2] "According to their spective powers," has reference to the power ssessed by the company to do that which is quired, whether derived from its charter or her statutory grant,[3] or by contract or arrangeent.[4] The clause, "and shall not discriminate their rates and charges between such conecting lines," was probably added because of the ntrariety of opinion among the English judges s to whether "facilities" included charges.[5] It oes not require a company, which has made proisions with a connecting road for the transaction f joint business, at an established union station, o make similar provisions with a rival connecting ine at another near point on its line, at which the econd line has made a mechanical union with its oad;[6] nor to make the same arrangements with a arrier connecting at the same place.[7] The block

signal system is held to be a "facility" with corresponding English statute.[8] Where it is that sufficient accommodation is not afforded meet the fair requirements of the public, thning of too small a number of trains, and stoppage at inconvenient times at a particution, may be regarded as a failure to provide facilities for traffic.[9] A failure to provide sulocomotive power to properly work and manrailway, and to haul away with regularity dispatch loaded cars, and to return empty ca a failure to afford reasonable facilities for reiving, forwarding, and delivery of traffic; also, is a failure to provide sufficient cars.[11]

1 Railway and Canal Traffic Act, 1854, § 2.

2 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 1 Rep. 567.

3 Tharsis v. London etc. R'y Co. 3 Nev. & Mac. 455; Watkins Wrexham etc. R'y Co. 3 Nev. & Mac. 164.

4 London etc. R'y Co. v. Staines etc. R'y Co. 3 Nev. & Mac. 48.

5 J. C. Harper, "Law of Interstate Commerce," 113; Great We R'y Co. v. Railway Commissioners, In re Brown, 7 Law R. Q. B. Div Law J. Q. B. Div. 483; 45 Law T. N. S. 206; 2 Week. R. 901—C. A. ing 45 Law T. N. S. 65—D. See 3 Nev. & Mac. R'y Cas. 523, for ac commissioners. The commissioners had previously held that marginal or excessive charges was a failure to afford all reasonable fa Aberdeen Co. v. Gt. Northern R'y Co. 3 Nev. & Mac. 205; Chatter Co. v. North S. R'y Co. 3 Nev. & Mac. 233. See, also, Young v. Gwenb V. R'y, 4 R'y & Can. Traf. Cas. 247.

6 Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. R. C U. S. 667.

7 Napier v. Glasgow etc. R'y Co. 4 Ses. Cas. 87 (3rd Ser.); 1 Nev Mac. 292.

8 London etc. R'y Co. v. Staines etc. R'y Co. 3 Nev. & Mac. 48.

9 Caterham R'y Co. v. London etc. R'y Co. 1 Com. B. N. S. Law J. Com. P. 16; 1 Nev. & Mac. 32; Barrett v. Great Northern R'y Nev. & Mac. 38. See Toomer v. London etc. R'y Co. 3 Nev. & Mac Dublin etc. R'y Co. v. Midland etc. R'y Co. 3 Nev. & Mac. 379.

10 Watkinson etc. Co. v. Wrexham etc. R'y Co. 3 Nev. & Mac. 446.

11 Tharsis etc. Co. v. London etc. R'y Co. 3 Nev. & Mac. 455.

1050. Facilities for traffic—The English de-
s.—In a leading case under the English

ıe commissioners held that a railway company
not afforded reasonable facilities for the re-
ıg, forwarding, and delivery of traffic upon its
ay, and ordered that the platforms should be
ıded; that a part of such platforms should be
rranged that carriages might set down and
up passengers under cover; that more wait-
rooms should be provided, and a part of the
ion reserved for refreshment purposes; that the
king-offices should have more than one window
the issuing of tickets; that cattle-pens into
ich the stock could be unloaded should be erect-
and that a bridge which connected the up-and-
wn platforms, and by which persons at the
ıtion were required to cross the line, should be
vered over.[1] Upon proceedings in prohibition
is decision was overruled by the Queen's Bench
ivision, and, an appeal being allowed, the Court
Appeal reversed this action, holding that the
ıbject-matter of the complaint and application was
ıot beyond the scope of the jurisdiction of the
ommissioners, but that the commissioners had no
power peremptorily to order particular works to be
executed according to a specific plan; that the or-
ders with respect to the platforms and goods-yards
and the approach road were in excess of jurisdic-
tion; that the orders as to refreshment accommo-
dation, and the covering over of platforms, carriage-
yard and bridge, were not "facilities" within the
statute; but that the orders as to booking-office,
waiting-room, and cattle accommodation were such
facilities, and that all orders except those relating
to the cattle accommodation and the delivery of
tickets at the booking-office were in excess of ju-
risdiction.[2]

[illegible] Evening Post Journal v. South Eastern R'y Co. 3 Nev. & M. [illegible].

[illegible] The Queen v. South Eastern R'y Co. v. Railway Commissioners, L. R. 2 Q. B. Div. 217; 3 Nev. & Mac. 464.

§ 2261 **Station facilities.**—At common law a railroad company has authority to establish its stations for receiving and putting down passengers and merchandise, and may regulate the time and manner in which it will carry them; and in the absence of statutory obligation it is not required to establish stations for those purposes at a point where another railroad company has made a connection with its road;[1] but a railroad may be required to offer proper station facilities and prevented from abandoning stations already established. Where it is within the power of a railway company, and the public convenience demands it, the company may be required to provide proper facilities at a point where it has previously had stations for the receipt and delivery of freight. Land owned by a railway company, but not used in its business of transportation, may be rented for the purpose of storage (as of coal) to its customers, without rendering it liable to proceedings as for an undue preference; facilities of storage after delivery to a consignee not being within the act.[4] The question how far a sender of goods may require delivery at any station he may select, as perishable freight at a certain station, is to be determined with reference to the powers and circumstances of the railway company, and to the reasonableness of the demand.[5]

[1] Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co. 110 U. S. 667.

[4] Connecticut v. New Haven etc. Co. 37 Conn. 153, 163; State v. New

ren etc. Co. 42 Conn. 56; New Haven & Northampton R. R. Co. v. nmersley, 104 U. S. 1; Railroad Comm'rs v. Portland etc. R. R. Co. Me. 269; Commonwealth v. Eastern R. R. Co. 103 Mass. 254; State v. cago etc. R. R. Co. 19 Neb. 476.

3 Local Board etc. v. North Eastern R. R. Co. 3 Nev. & Mac. 306. And n to provide a new station: Harris v. London etc. R. R. Co. 3 Nev. & c. 331.

4 West v. London & Northwestern R'y Co. Law R. 5 Com. P. 622; 39 w J. Com. P. 282; 23 Law T. N. S. 371; 18 Week. R. 1028; 1 Nev. & ac. 166.

5 Thomas v. North Staffordshire R'y Co 3 Nev. & Mac. 1.

§ 1052. Interchange of traffic.—Under a charter providing that a railroad "may connect and join" with other roads, a physical and not a business connection is contemplated.[1] It is held in several cases that a railway company is bound at common law to transport or haul upon its road the cars of any other railroad company when requested so to do;[2] but it is not bound to carry beyond its own lines;[3] and if it contracts to carry beyond, it may, in the absence of statutory regulations, determine for itself what agencies it will employ.[4] At common law, the refusal of a carrier to make through traffic arrangements upon joint through rates with one road, while making them with others, does not constitute undue or unreasonable discrimination in charges or facilities.[5] Such a right is incident to their powers, unless prohibited by their charter, and where such contracts are not unjust, unconscionable, or in restraint of trade, they will not be interfered with.[6] Contracts between railroad companies for the advantageous transaction of business at a given point involve corresponding obligations to the public.[7] A railroad having facilities for the interchange of traffic at a given place, and affording to some connecting lines these facilities, cannot deny to other connecting lines at that

point the same proper, reasonable, and equal li-
ties.[9] Where a railway company adopted a re-
lation, that they would not sell tickets for
over the line of a connecting road, unless such
necting road would abstain from paying com-
sions to their agents on the sales made, and w
make promise to that effect, it was held that
regulation was reasonable, and therefore leg
All railroads created by competent public author
must be conclusively presumed to be public c
veniences, and other common carriers cannot refu
to exchange traffic with them on any suggestion
showing to the contrary.[10] A short road, whol
within a State, but used and operated by connec
ing lines for interstate business, is one of the "in
strumentalities of shipment or carriage," and mus
be accessible to all interstate shippers on equal and
reasonable terms. The public cannot be deprive
of this right by the separate or joint action of the
carriers, and they cannot be permitted to use it
for purposes of discrimination between shippers.
Where two rival carriers connected with a railway
company, both carrying freight between the same
points, sustaining the same relation to the com-
pany, and seeking its services to forward their
freight to the same destination, and the company
systematically discriminated against one by charging
it fifty per cent. more for freight than it charged
the other, it was held that the line discriminated
against might maintain an action for damages.[12]

1 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. Rep. 567; Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co. 110 U. S. 667. And see Logan v. Central R. R. of Ga. 74 Ga. 684.

2 Vermont etc. R. R. v. Fitchburg R. R. 14 Allen, 462, 469; Mackin v. ston & A. R. R. 135 Mass. 201, 206; Peoria etc. R. R. Co. v. Chicago etc. Co. 109 Ill. 135; S. C. 13 Cent. Law J. 111, and note thereto; S. C.

.. & Eng. R. R. Cas. 506; McCoy v. Cincinnati, L St. L. & C. R. . 13 Fed. Rep. 3; and also collection of decisions, 19 Cent. Law

Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co. 110 U. S. 0; Rome R. R. Co. v. Sullivan, 25 Ga. 228; Atchison etc. R. R. Co. ach, 35 Kan. 749.

Atchison, T. & S. F. R. R. Co. v Denver & N. O. R. R. Co. 110 U. S. 30; Napier v. Glasgow etc. R'y Co. 4 Scs. Cas. (3rd Ser.) 87; 1 Nev. & 292.

Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. Rep 567; so Towboat Co. v. Pontchartrain R. R. Co. 24 La. An. 1.

Muhall v. Pennsylvania R. R. Co. 92 Pa. St. 15.

Riddle, Dean & Co. v. New York, L. E. & W. R. R. Co. 1 Inter. . C. 594.

Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. 567.

Chicago & A. R. R. Co. v. Pennsylvania R. R. Co. 1 Inter. Com. C. 88.

Kentucky & I. Bridge Co. v Louisville & N. R. R. Co. 37 Fed. Rep. 2 Inter. Com. C. 162. See, also, Little Rock & M. R. R. Co. v. East nessee, V. & G. R. R. Co. 3 Inter. Com. C. 1.

Heck v. East Tennessee etc. R'y Co. 1 Inter. Com. C. 495.

Samuels v. Louisville & N. R. R. Co. 31 Fed. Rep. 57.

§ 1053. **The same subject, continued—Exceptions to the general rule.**—A route for which through rates are proposed, that would be a reasonable and serviceable route if worked through it by one railway company, does not lose its serviceableness because two or more companies are concerned in working it; the companies should cooperate for the transit of through traffic, and send it forward to its destination as though it were their own proper traffic.[1] Two railway companies having stations in the same town, and being connected by a track which they used for freight only, were, in England, compelled to use the connecting line for passengers also, and to allow through rates for passenger traffic.[2] Shippers cannot be compelled to send their goods by a circuitous route, when two railways comprise a continuous line adopted to their needs, and may require such railways to transport

their freight.[3] In England it is held that th missioners have no power to make an order railway companies to act jointly in doing neither company has power to do separate where such an order has been made, a proh may issue from the High Court of Justice a them.[4] It has also been held there that a ra company which was required to afford to a company all usual facilities, including throug riage of cars, was not bound to carry a Pu sleeping-coach at the ordinary rates, since it much heavier than, and was otherwise unlik dinary cars used for like purposes.[5] It wou an undue preference if a company, as to tra the same description going between the s places, worked it at through rates if the t passed off their line at one point, and refused facility if it passed off at another.[6] A rail company is not bound to provide ticket-of at places off its line, nor to arrange for the c veyance by road of goods between such places the nearest station on their railway;[7] nor ca charge a higher storage rate on goods about to conveyed by the railway of another comp than on goods about to be conveyed on own line.[8] The Commissioners cannot or accommodation to be provided which ent the acquirement by the company of additio land which they have no immediate power take.[9] An agreement between several railw companies, some of which own and control c peting lines, for the appointment of a comm governing committee, or an association to fix t rates for which freight should be carried to a

points within a State, was declared to be in ɔtion of a constitutional provision against the ɔolidation of parallel or competing lines.[10] The vision that a carrier shall not be required "to ɔ the use of its tracks and terminal facilities to ther carrier engaged in like business," is a itation upon the duty of affording reasonable, per and equal facilities for the interchange of ffic between connecting lines, and a carrier may ıtract for the use of its tracks and terminal ilities with one or more connecting lines, with-ɔ discriminating against others.[11]

Swindon etc. R'y Co. v. Great Western R'y Co. 4 Nev. & Mac. 349.

2 Local Board etc. v. London etc. R'y Co. & South Eastern R'y Co. ev. & Mac. 21.; James etc. v. Taff Vale etc. R'y Co. 3 & M. Nev. 540. ı. also, Toomer v. London etc. R'y Co. 3 Nev. & Mac. 79.

3 Victoria etc. R. R. Co. v. Neath etc. R'y Co. 3 Nev. & Mac. 37.

4 Toomer etc. v. London etc. R. R. Co. 3 Nev. & Mac. 79.

5 Caledonia R'y Co. v. North British R'y Co. 3 Nev. & Mac. 56.

6 Swindon etc. R'y Co. v. Great Western R'y Co. 4 Nev. & Mac. 349.

7 Dublin etc. R'y Co. v. Midland etc. R'y Co. 3 Nev. & Mac. 379.

8 Toomer v. London etc. R'y Co. 3 Nev. & Mac. 79.

9 Harris etc. v. London etc. R'y Co. 3 Nev. & Mac. 331.

10 Gulf, Colorado & S. F. R. R. Co. v. State of Texas, 2 Inter. Com. . 335.

11 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. ep. 567.

CHAPTER XLII.

THE LONG AND SHORT HAUL.

§ 1054. Greater charge for shorter than for longer haul forbidden.
§ 1055. Scope of the enactment.
§ 1056. "Circumstances and conditions."
§ 1057. The provision, as it affects through and local rates.
§ 1058. Of claims under this section before the Commission.
§ 1059. Pooling arrangements prohibited.
§ 1060. Printing and posting of schedules of rates, fares and charges.
§ 1061. The same subject, continued—Foreign schedules.
§ 1062. Notice of advances or reductions.
§ 1063. Notice of changes in joint rates—Forms of schedules.

§ 1054. Greater charge for shorter than for longer haul forbidden.—"SEC. 4. That it shall be "unlawful for any common carrier subject to the "provisions of this act to charge or receive any "greater compensation in the aggregate for the "transportation of passengers or of like kind of prop- "erty, under substantially similar circumstances and "conditions, for a shorter than for a longer distance "over the same line, in the same direction, the "shorter being included within the longer distance: "but this shall not be construed as authorizing any "common carrier within the terms of this act to "charge and receive as great compensation for a "shorter as for a longer distance: *provided, however,* "that upon application to the Commission appointed "under the provisions of this act, such common car- "rier may, in special cases, after investigation by

e Commission, be authorized to charge less for
ger than for shorter distances for the transporta-
on of passengers or property; and the Commission
ay, from time to time prescribe the extent to
hich such designated common carrier may be re-
eved from the operation of this section of this act."

There is no counterpart of this section in English
gi lation, although the construction placed upon
e "undue preference" clause of the English act has
bstantially accomplished its object. Statutes of
milar character are to be found in Illinois,[1] Massa-
husetts,[2] Oregon,[3] and New Hampshire.[4] Under
he statute of Illinois it has been held that a larger
harge for a shorter haul is an unjust discrimina-
tion against communities, and it is not permissible
to show that the higher rate for the shorter dis-
tance is reasonable, since the lower charge for the
longer distance makes it unreasonable.[5] By the
constitutions of Pennsylvania, Missouri, Arkansas
and California, railroads are prohibited from charg-
ing a greater amount for a less distance than for a
greater, either for freight or passengers.[6] There is
no requirement of the common law, that when
there is a difference of distances, the charge shall
be proportioned to the respective distances.[7] A
larger charge for a shorter than for a longer haul
is held to amount to an undue preference under
the English statute;[8] and even the same charge for
a shorter haul as for a longer haul has been held to
be an undue preference.[9] So, too, reductions in
fare in favor of longer distances have been recog-
nized as proper under the English acts.[10] From
the circumstance that the words "in the aggre

place" are used in this section and in section of the act in connection with charges for transportation, it seems to be deducible that if the same service is performed, the charges for demurrage, terminal and other facilities must be the same [illegible] as for through traffic; and the place at which the goods are shipped and the destination thereof are not "circumstances" authorizing a difference in charge, and such is the rule in England.[1] By the words "same line," as used in this section, a physical line and not a mere business arrangement is intended. One piece of a road may be part of several lines.[2] Violations of this section of the act can be accomplished by differences in classification as well as by differences in tariff rates. The Commission holds that the cases in which it is authorized to make orders suspending the operation of the law, are exceptional cases, and where only general reasons operate, the law shall be left to its course, however serious the consequences in particular cases. Incidental injuries must be borne for the public good, until the legislature provides a remedy, and the mere probability that injury will result from the operation of the act, will not authorize the Commission to direct a suspension.[3]

1 Act of May 2, 1873, § 3; Rev. Stat. Ill. 1883, p. 894, § 125; Starr & Curtis' Annotated Stat. Ill. 1885, § 147.

2 General Railroad Act, 1874, ch. 372, § 140.

3 Act of Feb. 26, 1885, § 4; Laws 1885, p. 38.

4 See Osgood v. Concord R. R. Co. 63 N. H. 255.

5 Chicago & A. R. R. Co. v. People, 67 Ill. 11. See Act of 1873, § 3; Starr & Curtiss' Annotated Stat. Ill. 1885, § 147.

6 Pa. Const. (1874) Art. XVII, § 3; Mo. Const. (1875) Art. XII, § 12; Ark. Const. (1874) Art. XVII, § 3; Cal. Const. (1873) Art. XII, § 21.

7 St. Louis, Alton & T. H. R. R. Co. v. Hill, 14 Bradw. (Ill. App.) 579 (584).

Budd v. London & N. W. R'y Co. 4 R'y & Can. Traf. Cas. 393; 36 N. S. 202.

Denaby etc. Co. v. Manchester etc. R'y Co. 3 Nev. & Mac. 426.

Hozier v. Caledonian R'y Co. 17 Scs. Cas. 302; 24 Law T. 339; 1 & Mac. 27; Jones v. Eastern Counties R'y Co. 3 Com. B. N. S. 718; 1 & Mac. 45; Ransome v. Eastern Counties R'y Co. 1 Nev. & Mac. 117.

Denaby etc. Co. v. Manchester etc. R'y Co. Law R. 11 App. Cas. 97; ome v. Eastern Counties R'y Co. (No. 2), 4 Com. B. N. S. 135; 1 Nev. & 109; Budd v. London & N. W. R'y Co. 36 Law T. N. S. 332; 4 R'y & Traf. Cas. 393; Oxlade v. North Eastern R'y Co. (No. 1), 1 Com. B. N. 4; 1 Nev. & Mac. 72.

Boston & Albany R. R. Co. v. Boston & L. R. R. Co. 1 Inter. Com. 53.

Martin et al. v. Southern Pacific Co. et al. 2 Inter. Com. C. 1.

Petition of Minneapolis & N. W. R'y Co. 1 Inter. Com. C. 73.

§ 1055. **Scope of the enactment.**—Under this ction of the act, a common carrier may charge ss for a long haul to or from a particular place, ıan for a short haul included therein, provided ıere is competition in the carriage of persons or roperty to or from that place.[1] The Commission, ı construing and applying this section, has held, hat a higher charge for a shorter than for a long- r haul cannot be justified by the fact that the esser charge on the longer haul has for its motive he encouragement of manufactures or some other branch of industry; nor that it is designed to build up business or trade centers; nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centers or industrial establishments have been built up.[2] Neither is such greater charge justified by the fact that the lumber business of the roads of a connecting line, or any of them, was done in cars which carried machinery to the longer-distance point when profitable return loads were not always to be had.[3] Nor does a difference in the bulk and value of lumber justify a greater charge when the carriers in their published rate-sheets put the lum-

ber in the same class and at the same rate. great distance between Denver and Kansas itself suggests an impropriety in charges fr Francisco to Denver which exceed those fr Francisco to Kansas City.[5] The fact that fre paid a local rate over the roads of the defend of other railroad companies to the longer-di point, does not justify a greater charge for a s distance.[6] Localities must accept their geog ical situation and its consequences.[7] Where road has two routes or lines between the places, a greater charge for a shorter than longer distance in the same direction, the sh being included in the longer distance, on eith said routes or lines, is unlawful under this sect Reductions in competitive passenger rates o not to be made, without at the same time redu intermediate rates.[9] The fact that long-haul t fic will only bear certain rates is no reason carrying it for less than cost at the expense other traffic.[10] Where the railroad commission had fixed the rates between points, the fact tha railroad company greatly reduced the rate for t longer distance did not amount to unjust discrim nation, if the rate for the shorter distance did n exceed the rate fixed by the commissioners, althou it did exceed that charged for the longer distance.

1 Ex parte Koehler, 31 Fed. Rep. 315; Farrar v. East Tennessee, Va. & Ga. R'y Co. 1 Inter. Com. C. 480.

2 In re Petition of Louisville & N. R. R. Co. 1 Inter. Com. C. 31; Martin v. Southern Pacific R'y Co. 2 Inter. Com. C. 1. Long and short haul clause discussed: Report of Commission, 1 Inter. Com. C. 278; Report of Commission, 2 Inter. Com. C. 412; In re Tariff & Classification of Atlantic & W. P. R. R. Co. 3 Inter. Com. C. 19.

3 James & Abbott v. East Tennessee, Va. & Ga. R. R. Co. et al. 3 Inter. Com. C. 225.

4 James & Abbott v. East Tennessee, Va. & Ga. R. R. Co. et al. 3 Inter. Com. C. 225.

rtin et al. v. Southern Pacific Co. et al. 2 Inter. Com. C. 1.
mes & Abbott v. East Tennessee, Va. & Ga. R. R. Co. 3 Inter. 225.
ncoln Board of Trade v. Missouri Pacific R'y Co. 2 Inter. Com.

gan et al. v. Chicago & N. W. R'y Co. 2 Inter. Com. C. 604.
re Passenger Tariffs & Rate Wars, 2 Inter. Com. C. 513.
re Petition of Louisville & N. R. R. Co. 1 Inter. Com. C. 31.
ailroad Co. v. Hill, 14 Bradw. Ill. App. 579.

056. "Circumstances and conditions."—er this section, there is no prohibition where circumstances and conditions are dissimilar, only where they are similar; and where the mstance or condition which produces the dislarity cannot be clearly shown, the doubt ıld be given in favor of the object of the law, the circumstances and conditions be construed be substantially similar.[1] The fact that one road line competing for long-haul traffic is long l circuitous, and in order to share in the traffic bliged, as against competitors having more dit lines, to make concessions in its charges, will t make out the dissimilar circumstances and conions which alone can justify the greater charge r the shorter than for the longer haul.[2] Where e real competition for long-haul traffic is by railad, the fact that there is also water competition ill not of itself make out the dissimilar circumances and conditions which will support greater harges on shorter than on longer hauls.[3] The resence of combined rail and water competition at longer-distance point does not justify a greater harge for a shorter distance, while the carrier naintains the shorter-distance rate where such competition is of greater force than at the longer-

[illegible] points.[4] The Commission has decided that a carrier may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, when the competition is with carriers by water, or with railroads which are not subject to the provisions of the statute, or between railroads which are not subject to the statute, when a strict application of the rule would be destructive of legitimate competition.[5] The fact that a competitor may charge for the transportation of freight which are low but are reasonable and just to the carrier does not constitute such a case of dissimilar circumstances and conditions as entitles the responsible to make charges for the transportation of freight which are greater than those made for the transportation of through shipments between the same points.[6] The fact that cotton was shipped from interior points at lower rates, being compressed, and thereby greatly reduced in bulk, is not evidence that higher rates for shorter distances, upon uncompressed cotton, are unreasonable.[7] The "circumstances and conditions" attending the transportation of passengers and freight to and from the Republic of Mexico were held by the Commission so substantially different from those surrounding transportation to other points, as to justify a railroad company in establishing lower rates on freight transported for export into and received from Mexico, than are charged in the United States.[8] It is not a sufficient justification for a greater charge that the short-haul traffic is more expensive to the carrier, unless the circumstances are such as to

it exceptionally expensive, or the long-haul exceptionally inexpensive.[9] Whenever the e of transportation is the same, the charge d be the same; the uses or destination of the nandise are entirely immaterial.[10] The ex- of starting trains is the same for a short as long haul.[11]

[9] Missouri Pacific R'y Co. v. Texas & P. R'y Co. 31 Fed. Rep. 862. [10] In re Petition of Louisville & N. R. R. Co. 1 Inter. Com. C. 31.
[11] Boston & Albany R. R. Co. v. Boston & L. R. R. Co. et al. 1 Inter. C. 158.
Boston & Albany R. R. Co. v. Boston & L. R. R. Co. et al. 1 Inter. C. 158; Harwell v. Columbus etc. R. R. Co. 1 Inter. Com. C. 236.
James & Abbott v. East Tennessee, Va. & Ga. R. R. Co. et al. 3 Inter C. 225.
In re Petition of Louisville & N. R. R. Co. 1 Inter. Com. C. 31.
In re Chicago, St. P. & K. C. R. R. Co. 2 Inter. Com. C. 231.
Lotspeich v. Central R. R. Co. 73 Ala. 306; S. C. 18 Am. & Eng. R. 490.
Petition of Receivers of Texas & Pac. R. R. Co. 1 Inter. Com. C. 30.
In re Petition of Louisville & N. R. R. Co. 1 Inter. Com. C. 31.
Twells v. Pennsylvania R. R. Co. 3 Am. Law Reg. (N. S.) 728; Mis-Pac. R'y Co. v. Texas & Pac. R'y Co. 30 Fed. Rep. 2.
Ransome v. Eastern Counties R'y Co. 1 Nev. & Mac. 117.

1057. The provision as it affects through . local rates.—In the nature of things, joint or ough rates on long hauls usually are, and as a should be, lower in proportion to distance n local rates on short hauls of the same com- lity.[1] At common law a railroad common car- is not bound to carry beyond its own line, and t contracts to do so, it may, in the absence of utory regulations, determine for itself what ncies it will employ, and is not bound to stop trains and exchange traffic at a junction with ther road where it has not established a sta- n.[2] Nor can a railroad corporation be com- led to give a bill of lading for delivery beyond

its line.[3] The service rendered by a railway company in transporting a passenger from one on its line to another is not identical with the ice rendered in transporting a through pas- over the same line.[4] The question of a g charge in the aggregate for a shorter than longer distance over the same line in the direction is not to be determined by the prop allotted to different roads composing the line by the rate as an entirety.[5] The act appli- a case where several roads join in making tariff which constitutes the lesser charge o longer haul, while one or more of their nu make the greater charge on the shorter haul. those who make such greater charge must ju it.[6] When a greater charge in the aggrega made for the transportation of passengers or like kind of property for a shorter than fo longer distance, the shorter being included in longer distance, the fact that the traffic which subjected to such greater charge is way or lo traffic, and that which is given the more favor- rates is through traffic, will not sustain the dif ence in charges.[7] The fact that railroad compan accept on through shipments a certain sum as the share for the transportation of the freight betwee intermediate points, is no ground for compelling them to accept a like sum on local shipments be tween those intermediate points when it appears that this would be a reduction below the local rates between them, and apparently under similar circumstances and conditions.[8] A violation of this tion is not made out by showing that a carrier, n called upon by a consignor for through rates,

, such as are greater for the shorter distance
ceives the amount for itself and its connec-
when it appears that on its own line the
es are greater for the longer distance, and
rough charges by the shorter line are only
greater by the fact that the connecting road
has the shorter line makes higher rates than
onnecting road which has the longer line.[9] A
eable feature of through rates is that the rate
on per mile grows less in proportion to the
nce, while the aggregate of the rate increases
oportion to such greater distance; but this is
he case with local rates except as an incident
are and highly exceptional conditions of the
sportation service.[10]

Farrar v. East Tenn. Va. & Ga. R'y Co. 1 Inter. Com. C. 480.

Atchinson, T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co. 110 U. , 685; Myrick v. Michigan C. R. R. Co. 107 U. S. 102; Stewart v. Terre e etc. R. R. Co. 3 Fed. Rep. 768; 1 McCrary, 312; Ogdensburg etc. R.). v, Mineral Springs Manuf. Co. 16 Wall. 318; Burroughs v. Norwich rcester R. R. Co. 100 Mass. 26; Pennsylvania R. R. Co. v. Berry, 68 t. 272; Babcock v. Lake Shore & Michigan Southern R. R. Co. 49 N. Y. Converse v. Trans. Co. 33 Conn. 166; Perkins v. Portland, Saco & mouth R. R. Co 47 Me. 573; Bintuall v. Saratoga & Whitehall R. R. 2 Vt. 673; Express Co. v. Rush, 24 Ind. 403; McMillan v. Railroad Co. ich. 119; Coates v. Express Co. 45 Mo. 238; Bussey v. Memphis etc. R. o. 13 Fed. Rep. 330.

Lotspeick v. Central R. R. & Bkg. Co. 73 Ala. 306; 18 Am. & Eng. R. as. 491; Bussey v. Memphis etc. Co. 13 Fed. Rep. 330; Myrick v. Mich- Central R. R. Co. 107 U. S. 102, 108.

Union Pacific R'y Co. v. United States, 117 U. S. 355.

Imperial Coal Co. et al. v. Pittsburgh & L. E. R. R. Co. et al. 2 In- Com. C. 618.

Boston & Albany R. R. Co. v. Boston & L. R. R. Co. et al. 1 Inter. n. C. 158.

In re Petition of Louisville & N. R. R. Co. 1 Inter. Com. C. 31.

Ralph W. Thatcher v. Delaware etc. Canal Co. et al. 1 Inter. Com. 152.

Allen v. Louisville, N. A. & C. R. R. Co. 1 Inter. Com. C. 199.

Business Men's Association of the State of Minnesota v. Chicago, P. etc. R. R. Co. 2 Inter. Com. C. 52.

§ 1058. Of claims under this section before the ommission.—The Commission will not make an

order for relief under this section except upon a specified petition and after investigation into the facts. Where the purpose of a complaint is to obtain a reduction of through rates from a distant point over several roads, all the roads constituting the through line should be parties; it is not enough to make the first road which first receives the freight a party, unless it is shown that it has no control of the rate beyond its own line; an order directed only to that road would be ineffectual to accomplish the desired result. The Commission will not decide whether the circumstances and conditions of a particular railroad will justify higher charges for shorter distances than in its own petition, but will leave it to fix its rates and decide upon their propriety when they are complained of by persons or localities claiming to be injured by them.[3] The mere desire of one railroad to know whether another is justified in making high charges on short-haul traffic, in order that it may do the same if such charges are sustained, is not sufficient to give it standing before the Commission. The case of every road must be determined on its own facts.[4] Carriers should make their tariffs within the requirements of the law, without suggestions from the Commission as to details.[5] The provisions of section one, requiring charges to be reasonable and just, and of section two, forbidding unjust discrimination, apply when exceptional charges are made under section four as they do in other cases.[6] The burden of proof is on the carrier to justify any departure from the general rule prescribed by the statute, by showing that the circumstances and conditions are substantially dissimilar.[7] When a question of rates as between two carriers

lved, the Commission will express no opin-
on it, unless both carriers are parties to the
.ling.[3] An entire contract to carry between
oints, in absence of contrary evidence, im-
hat the charge is the same on every part of
stance.[9]

re Southern Pacific R. R. Co. 1 Inter. Com. C. 6.
wild F. Allen and another v. Louisville, N. A. & C. R. R. Co. 1
om. C. 199.
re Petition of Louisville & N. R. R. Co. Inter. Com. C. 31.
oston & Albany R. R. Co. v. Boston & L. R. R. Co. et al. 1 Inter.
. 158.
re Tariffs of Columbus & W. R'y Co. 1 Inter. Com. C. 26.
re Petition of Louisville & N. R. R. Co. 1 Inter. Com. C. 31.
re Petition of Louisville & N. R. R. Co. 1 Inter. Com. C. 31.
entucky & Ind. Bridge Co. v. Louisville & N. R. R. Co. 2 Inter.
. 162.
Vabash etc. R'y Co. v. People, 105 Ill. 236. But see S. C. 118 U.

1059. Pooling arrangements prohibited.—
C. 5. That it shall be unlawful for any common
rier subject to the provisions of this act to en-
into any contract, agreement, or combination
th any other common carrier or carriers for the
oling of freights of different and competing rail-
ads, or to divide between them the aggregate or
t proceeds of the earnings of such railroads, or
ıy portion thereof; and in any case of an agree-
ent for the pooling of freights as aforesaid, each
ıy of its continuance shall be deemed a separate
ffense."

There is a similar statutory prohibition of
lway pools in Oregon;[1] and by the constitution
California, railways and common carriers are
bidden to pool their earnings with any other
mmon carrier or with the owners of any vessel

leaving or making port in the State.[2] A "pooling" is an arrangement by which several railway companies, competitors with each other, agree to divide the total receipts from traffic in definite proportions, regardless of the quantity of traffic which they may actually carry.[3] Although the English acts do not contain this provision, the courts hold such agreements to be unlawful. In granting an injunction restraining the execution of a pooling arrangement, it was said: "An agreement that the profits and loss shall be brought into one common fund, and the net receipts divided into two shares, nine-tenths and one-tenth, without an authority of an act of Parliament, appears to me so clearly and palpably illegal that I do not think the court ought to hesitate in its views in that respect; otherwise it might be that all the railways in the kingdom might be collected into one large joint-stock concern."[4] In all such unlawful combinations, the gist of the offense is conspiracy. Men can often do by combination, what severally no one could accomplish, and even what, when done by one, would be innocent.[5] Any agreement to maintain prices or rates, and which tends to deprive the public of the natural and legitimate fruits of competition, has been held to be contrary to public policy.[6] It has been held, that after a pooling contract between railroads has been fully executed, the railroad which has availed itself of all the benefits to be derived from it, is estopped to deny its validity.[7] This section does not invalidate a contract between two railroad companies, whose lines of roads are parallel, by means of which naturally tributary territory is preserved to each, within which it

prosecute the work of extending its branch , etc., without interference with or from tho r; but it may prevent pooling provisions ein from being operative.[8]

Act of February 20, 1885, § 3.

Cal. Const. (1873), Art. XII, § 20.

W. A. Hunter, LL. D., M. P., in "The Railway and Canal Traffic f 1888," p. 3.

Wood, V. C. in Charlton v. Newcastle etc. R. R. Co. 5 Jur. N. S. Staunton v. Allen, 5 Denio, 440. But see, *contra*, Hare v. London . R. Co. 2 Johns. & H. 80.

Commissioners v. Carlisle, Brightly, 40 See note by Mr. Adelbert lton, 15 Fed. Rep. 667, 672; Central R'y Co. v. Collins, 40 Ga. 582.

Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Crawford v. Wick, o St. 190; Pullman etc. Co. v. Texas etc. R'y Co. 11 Fed. Rep. 625, Wald's Pollock on Contracts, 309; Menacho v. Ward, 27 Fed. Rep. 34; 23 Am. & Eng. R. R. Cas. 647.

Nashua etc. R. R. Corp. v. Boston etc. R. R. Corp. 19 Fed. Rep. 804.

lves v. Smith (1889), 3 N. Y. Sup. 645. For consideration of the ct by the Commission see their annual report, 1 Inter. Com. C. 309, 2 Inter. Com. C. 436.

1060. Printing and posting of schedules of es, fares and charges.—"SEC. 6 (*As amended*), AR. 1. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedule printed as aforesaid by any such common carrier shall plainly state the places upon its railroads between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates and fares and charges. Such schedules

"shall be plainly printed in large type, an
"for the use of the public shall be poste
"public and conspicuous places, in every de
"tion, or office of such carrier where passe
"freight, respectively, are received for tra
"tion, in such form that they shall be acces
"the public and can be conveniently inspe

A similar provision is found in the English st and in that of Illinois.[2] A New Hampshir ute[3] required railway companies to put in the pots their tariff rates, and it was held that a s quent statute,[4] sanctioning a change in the tion of a road, in mentioning "published ta had reference to those posted in the depots in dience to the former statute.[5] In England, held that the obligation to keep books of rate the station from which the rates are charg taches equally whether the booking is done t or elsewhere;[6] and that for this purpose coal ings are stations within the meaning of the a Common carriers being under obligation to take descriptions of ordinary traffic from all points, i right that the rates should be known and announc publicly in advance of the offering of traffic.[8] T methods generally adopted by carriers in the pre aration and publication of rate sheets, if in sub stantial compliance with the law, and sufficient for the information of the public may be acquiesced in until a better mode can be substituted.[9] A classification sheet is put before the public for general information, and is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and can determine for himself what

an be lawfully charged for transportation. officials who prepare it have no authority to rue it, and must leave it to speak for itself.[10] tariffs must be posted at stations to which apply.[11]

tegulation of Railways Act, 1873, § 14.

Inderwood's Ill. Stat. ch. 114, § 19. And see St. Louis & Cairo R. v. Blackwood, 14 Ill. App. 503.

N. H. Laws 1852, ch. 1277, § 1.

N. H. Laws 1861, ch. 2540.

Locke v. Concord R. R. Co. 60 N. H. 552.

Jones v. North Eastern R'y Co. 2 Nev. & Mac. 208.

Harborne R'y Co. v. London etc. R'y Co. 2 Nev. & Mac. 169.

In re Tariffs of the Transcontinental Lines, 2 Inter. Com. C. 324. ection discussed by the Commission: Annual Report, 1 Inter. Com.

In re Passenger Tariffs, 2 Inter. Com. C. 649.

Hurlburt v. Lake Shore & M. S. R'y Co. 2 Inter. Com. C. 122.

In re Passenger Tariffs, 2 Inter. Com. C. 649.

1061. The same subject, continued—Foreign **edules.**—"SEC. 6, PAR. 2. Any common carrier bject to the provisions of this act, receiving eight in the United States to be carried through foreign country to any place in the United States, hall also, in like manner, print and keep open to ublic inspection, at every depot or office where uch freight is received for shipment, schedules, owing the through rates established and charged y such common carrier to all points in the United tates beyond the foreign country to which it ac- epts freight for shipment; and any freight shipped om the United States through a foreign country nto the United States, the through rate on which hall not have been made public, as required by his act, shall, before it is admitted into the United tates from said foreign country, be subject to cus- oms duties, as if said freight were of foreign pro-

"duction; and any law in conflict with this
"is hereby repealed."

The method for making rates should be cable, and not afford a cover for discriminat injustice. The Commission has decided t only practicable mode yet devised for through export rates is to add to the esta inland rates from the interior to the seabo current ocean rates.[1] Whenever a tariff is lished for merchandise intended for export and ocean rates are not specified, so that on charge for inland transportation is definitely the tariff should show the rate charged by inland carrier to the point of export, incl all terminal charges and expenses, and shoul show in what manner the through rate to the p of ultimate destination is to be determined.[2] der the provisions of this clause, the Grand T Railway of Canada is required to print, post. file its schedules of rates and charges for the tr portation of property from points in the Un States to points in Canada, and cannot lawfu charge a greater or less compensation therefor, for any services in connection therewith, than specified in such published schedule as may at t time be in force.[3] It is also subject to the pr visions of the act in respect to joint tariffs of rate fares, and charges for continuous lines or routes.[4]

1 New York Produce Exchange v. New York & H. R. R. Co. et al. Inter. Com. C. 225. For the order of the Commission in regard to the s ject of this clause, see In re Publication of Export Tariffs, 1 Inter. Co C. 658.

2 New York Produce Exchange v. New York & H. R. R. Co. et al. r. Com. C. 225.

In re Investigation of Grand Trunk R'y of Canada, 3 Inter. Com. C. 8

In re Investigation of Grand Trunk R'y of Canada, 3 Inter. Com. C. 8

2. Notice of advances or reductions.— 6, PAR. 3. No advance shall be made in ates, fares, and charges which have been es- hed and published as aforesaid by any com- carrier in compliance with the requirements is section, except after ten days' public notice, h shall plainly state the changes proposed to ade in the schedule then in force, and the time n the increased rates, fares, or charges will go effect; and the proposed changes shall be n by printing new schedules, or shall be ly indicated upon the schedules in force at the and kept open to public inspection. Re- ions in such published rates, fares, or charges l only be made after three days' previous pub- notice, to be given in the same manner that no- of an advance in rates must be given."[1]

PAR. 4. And when any such common carrier ll have established and published its rates, fares, charges in compliance with the provisions of this tion, it shall be unlawful for such common car- r to charge, demand, collect, or receive from any son or persons a greater or less compensation the transportation of passengers or property, or any services in connection therewith, than is cified in such published schedule of rates, fares, d charges as may at the time be in force."

EC. 6, PAR. 5. Every common carrier subject" the provisions of this act shall file with the mmission hereinafter provided for copies of its hedules of rates, fares and charges which have en established and published in compliance with e requirements of this section, and shall

"promptly notify said Commission of all c
"made in the same. Every such common
"shall also file with said Commission copies
"contracts, agreements, or arrangements wit
"common carriers in relation to any traffic a
"by the provisions of this act to which it n
"a party. And in cases where passengers
"freight pass over continuous lines or routes o
"by more than one common carrier, and the
"common carriers operating such lines or rou
"tablish joint tariffs of rates or fares or charg
"such continuous lines or routes, copies of
"joint tariffs shall also, in like manner, be filed
"said Commission. Such joint rates, fares
"charges on such continuous lines so filed as a
"said shall be made public by such common car
"when directed by said Commission, in so fa
"may, in the judgment of the Commission
"deemed practicable; and said Commission
"from time to time prescribe the measure of pu
"city which shall be given to such rates, fares, a
"charges, or to such part of them as it may deem
"practicable for such common carriers to publis
"and the places in which they shall be published

Schedules of joint tariffs required to be filed wi
the Commission, need not be duplicated by ea
company which unites in making them. The Com
mission has decided that on receipt of a writte
statement from each corporation acknowledgin
the authority of the association, committee, o
other traffic combination, to issue tariffs in its be
half, schedules filed by such association, etc., may
be credited to each road in the organization which

uests.[2] Through rates need not be shown, in or in part, at any other station than the one which the traffic carried at through rates is rded in the first instance.[3]

ıe last sentence in this paragraph was added by the amending March 3, 1889.

ı re Joint Tariffs & Schedules, 1 Inter. Com. C. 225. See Report of ıssion, 2 Inter. Com. C. 420; In re Filing of Joint Tariffs (Circular l Inter. Com. C. 657.

xlade v. North Eastern R'y Co. 3 Nev & Mac. 35.

063. Notice of changes in joint rates—ıs of schedules.—"SEC. 6, PAR. 6. No advance ll be made in joint rates, fares, and charges, ıwn upon joint tariffs, except after ten days' no- ɜ to the Commission, which shall plainly state ı changes proposed to be made in the schedule ɜn in force, and the time when the increased ɜes, fares, or charges will go into effect. No re- ction shall be made in joint rates, fares, and arges, except after three days' notice, to be given the Commission as is above provided in the case an advance of joint rates. The Commission may ake public such proposed advances, or such re- uctions, in such manner as may, in its judgment, ɜ deemed practicable, and may prescribe from time ı time the measure of publicity which common ırriers shall give to advances or reductions in joint ıriffs."

'PAR. 7. It shall be unlawful for any com- ıon carrier, party to any joint tariff, to charge, emand, collect, or receive from any person or per- ons a greater or less compensation for the trans- ıortation of persons or property, or for any services n connection therewith, between any points as to

"which a joint rate, fare, or charge is named
"than is specified in the schedule filed with
"mission in force at the time."

"PAR 8. The Commission may determine
"scribe the form in which the schedules
"by this section to be kept open to publ
"tion shall be prepared and arranged, an
"change the form from time to time as
"found expedient."

These clauses were added by the amending
March 3, 1889. Under the act as it stood
being amended, the Commission had held that
affected by a contemplated change of rates
entitled to notification thereof;[1] and a reducti
passenger rates without the consent of connec
lines over which tickets were sold, and withou
ing schedules thereof with the Commission,
held to be in violation of this section of the
Under the clause as it now stands, requiring
days' previous notice of advances, and three da
previous notice of reductions in rates, the
cannot be varied from day to day, or oftener,
meet fluctuations in ocean rates.[3] The Commissi
has stated its opinion of the form of tariffs a
classifications in use, and of the requirements
the statute in respect thereto.[4]

1 Howell v. Columbus etc. R. R. Co. 1 Inter. Com. C. 236.

2 In re Passenger Tariffs and Rate Wars, 2 Inter. Com. C. 513.

3 New York Produce Exchange v. New York & Hudson River R. R. C
et al. 3 Inter. Com. C. 225.

4 In re Tariffs and Classification of Atlanta & W. P. R. R. Co. et al.
Inter. Com. C. 19.

CHAPTER XLIII.

HE CONCLUDING SECTIONS OF THE ACT.

Continuous carriage not to be interrupted.
Liability of common carriers for damages.
Suits for damages in United States courts.
Penalties for violations of act by carriers.
Interstate Commerce Commissioners.
Powers of the Commission.
Complaints and investigations.
Findings of Commission as evidence.
The United States courts—Their powers—Appeals.
Interstate Commerce Commission—Forms of procedure.
Carriers to make annual reports to the Commission.
Reduced rates—Free passes.
Mandamus to compel movement of traffic, etc.

1064. Continuous carriage not to be interrupted.—"SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption

"was made in good faith for some necessary p
"and without any intent to avoid or unnec
"interrupt such continuous carriage or to eva
"of the provisions of this act."

This section is evidently modeled after a si
clause in the English statute.[1] Under the ter
previous act of Congress,[2] prescribing for the c
uous transportation of freight and passengers
connecting lines, it was held that the connect
ferred to was that whereby the cars of one roa
be transported over the other, so that passengers
freight may be carried as upon a continuous li
railway without change of cars, so that the
themselves, with their burdens, should be tr
ferred from one road to another, and passengers
freight be transported from ocean to ocean with
change of cars or breaking bulk, as upon one c
tinuous line of road; and that the purpose of t
statute was to promote speedy and unobstruct
transportation, and to relieve the products a
merchandise of the country of the indirect tax
breaking bulk and reshipping at the various ra
road *termini*, when being transported by rai
Railroads are bound at common law to receive an
haul cars of other roads.[4] A number of State
have expressly so provided.[5] Under a Pennsylva
nia statute the courts of that State hold that the
shipment of grain bought in another State and
stored for sale at Pittsburgh, and afterward re
shipped thence to Philadelphia, is to be classed as
local freight.[6] A "route" within the meaning of
corresponding section of the English act is held
a route from the station on the sending line,

the traffic arises, to the station on the forming line where such traffic is delivered.[7] And the same section it is also held that in order stify the interference of a court to enforce the ing of through trains on a continuous line of ays, it must be shown that public convenience ires it, and that it can reasonably be done;[8] that if a junction could not be reasonably ted when constructed, a company could not be ined to construct it as a reasonable facility.[9] no violation of this section for a railroad company to enter into contracts with other companies he establishment of through routes and through s for the continuous carriage of interstate fic.[10]

Railway & Canal Traffic Act of 1854, sec. 2, clause 3.

Approved July 1, 1862, 12 Stat. at Large, 495; Rev. Stat. § 5257.

Council Bluffs v. Kansas City etc. R. R. Co. 45 Iowa, 338, 351-2 (1876). Hardy v. Atchison, T. & S. F. R. R. Co. 32 Kans. 698, 717.

Vermont etc. R. R. v. Fitchburg R. R. 14 Allen, 462, 469; Mackin v. on & A. R. R. Co. 135 Mass. 201, 206; Peoria etc. R. R. Co. v. Chicago R. R. Co. 109 Ill. 135; S. C. 19 Cent. Law J. 111, and note; S. C. 18 Am. ıg. R. R. Cas. 506, and note.

Michigan Cen. Laws, 1873, p. 99; Georgia Act, Feb. 14, 1874. And see utes and decisions collected in note to 19 Cent. Law J. 113. See, also, an v. Central R. R. 74 Ga. 684.

Pennsylvania R. R. Co. v. Canfield, 46 Pa. St. 211.

East etc. R'y Co. v. Great Western etc. R'y Co. 1 Nev. & Mac. 331.

Barrett v. Great Northern R'y Co. 1 Com. B. N. S. 423; 26 Law J. n. P. 83; 1 Nev. & Mac. 38.

Dublin Whis. Dis. Co. Lim. etc. v. Midland & G. W. R'y Co. 4 R'y & ı. Traf. Cas. 32.

Kentucky & Ind. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. p. 567.

§ 1065. **Liability of common carriers for damages.**—"SEC. 8. That, in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be

"unlawful, or shall omit to do any act, matter
"thing in this act required to be done, such com-
"carrier shall be liable to the person or persons
"jured thereby for the full amount of damages
"tained in consequence of any such violation of
"provisions of this act, together with a reason-
"counsel or attorney's fee, to be fixed by the c
"in every case of recovery, which attorney's fee sh
"be taxed and collected as part of the costs in
"case."

Under the English act, no action lies for brea
of its provisions, the remedy being confined
injunction or interdict.[1] At common law, if
shipper is compelled to pay more than is reasonab
he may recover back, in an action for money ha
and received, the excess over a reasonable charge
and no protest is necessary.[3] If the shipper has
no other outlet for shipment, payments will be
deemed to be under duress, and excess paid by him
can be recovered back.[4] If, however, an inequality
of charge was known to a shipper, and paid with-
out objection, he could not recover;[5] but if, by rea-
son of bribes or other improper motives, railway
employees give preference to one person over an-
other, the company may be held liable for damage
thereby sustained.[6] Where parties are equally at
fault in having violated the law against extortion-
ate charges, as the railroad agent, as shipper, mak-
ing payments to himself as agent, there can be no
recovery.[7] It has been held in New Hampshire,
at an action lies in that State for damage caused
an unreasonable discrimination practiced in
ne, in violation of the law of the latter State.[8]

nand is not necessary before institution of
The constitutionality of other statutes pro-
for the recovery of counsel or attorney's fees
to be well settled.[10] The Commission holds
t is not authorized to award the counsel and
ey's fees, which may be given by a court
this section.[11]

enaby Main Colliery Co. v. Manchester etc. R'y Co. Law R. 11 H.
urray v. Glasgow etc. R'y Co. 11 Const. Ses. Cas. (4th Ser.) 205; 4 R'y
Prac. Cas. 456.

t. Western R'y Co. v. Sutton, Law R. 4 Eng. & Ir. App. 226, 237;
v. Bristol etc. R'y Co. 6 R'y Cas. 776; Johnson v. Pensacola & Per-
R. Co. 16 Fla. 623; Fisher v. New York Central & Hudson Riv. R.
46 N. Y. 644.

Geiserman v. Burlington etc. R'y Co. 63 Iowa, 732; Fuller v. Chicago
R. Co. 31 Iowa, 187.

Chicago & A. R. R. Co. v. Chicago etc. Coal Co. 79 Ill. 121; West
a Transp. Co. v. Sweetser, 25 W. Va. 434; S. C. 22 Am. & Eng. R. R.
3.

Reversed v. London & N. W. R. R. Co. Law R. 3 Q. B. Div. 144; S. C.
3 App. Cas. 1029; Lancashire R. R. Co. v. Gidlow, Law R. 7 H. L.
Parker v. Gt. Western R'y Co. 7 Man. & G. 253. See Hillme v. N. Y.
al R. R. Co. 100 N. Y. 395, 401.

Galena & C. R. R. Co. v. Rae, 18 Ill. 488.

Steever v. Illinois Cent. R'y Co. 62 Iowa, 371.

McDuffee v. Portland & Rochester R. R. Co. — N. H. 430 (1873).

West Virginia Transp. Co. v. Sweetser, 25 W. Va. 434.

Kansas Pac. R'y Co. v. Mower, 16 Kan. 573; Atchison etc. R'y Co. v.
er, 16 Kan. 529; Boston & M. R. R. v. Wentworth, 20 N. H. 406;
Pennsylvania R. R. Co. v. Adams, 54 Pa. St. 94; Birdsall v. Coolidge,
S. 64; Meeker v. Winthrop Iron Co. 17 Fed. Rep. 48.

W. H. Council v. Western & Atl. R. R. Co. 1 Inter. Com. C. 339.

**1066. Suits for damages in United States
rt.**—"SEC. 9. That any person or persons claim-
ng to be damaged by any common carrier subject
o the provisions of this act may either make com-
laint to the Commission as hereinafter provided
or, or may bring suit in his or their own behalf
or the recovery of the damages for which such
ommon carrier may be liable under the provisions
f this act, in any district or circuit court of the

" United States of competent jurisdiction; but
" person or persons shall not have the right t
" se both of said remedies, and must in eac
" elect which one of the two methods of pro
" herein provided for he or they will adopt. I
" such action brought for the recovery of dam
" the court before which the same shall be pe
" may compel any director, officer, receiver, tru
" or agent of the corporation or company defen
" in such suit to attend, appear, and testify in
" case, and may compel the production of the b
" and papers of such corporation or company p
" to any such suit: the claim that any such testim
" or evidence may tend to criminate the pe
" giving such evidence shall not excuse such w
" ness from testifying, but such evidence or te
" mony shall not be used against such person
" the trial of any criminal proceeding."

The Commission has decided that it will not g
into the question of damages when the claim pr
sented is in its nature an action of trespass, be
cause in such an action the defendant is consti
tutionally entitled to a trial by jury.[1] The con
stitutional power of the legislature to prescrib
rules of evidence is well settled.[2] The provisio
in the fifth amendment to the constitution of the
United States, that no person "shall be compelled
in any criminal case to be a witness against him
self," being intended for the security of person and
property, should be liberally construed.[3] Statutes
the giving of criminating evidence do
te this constitutional guaranty.[4] The
compulsory production of a man's pri

papers, to be used in evidence against him, is valent to compelling him to be a witness nst himself, and, in a prosecution for a crime, lty, or forfeiture, is equally within the protion of the fifth amendment.[5] Where in a e constitution the guaranty was, that no person all be compelled to accuse or furnish evidence inst himself," it was held that the statute must only provide that the testimony shall not be used inst him, but also, that he shall not thereafter be secuted for any offense so disclosed by him.[6] But statute expressly provides that "such evidence testimony shall not be used against such person the trial of any criminal proceeding," it takes ay the privilege, because no danger can exist such testimony being used against the witness a criminal prosecution.[7]

1 Councill v. Western & Atlan. R. R. Co. 1 Inter. Com. C. 339; Heck East Tennessee, Va. & Ga. R. R. Co. 1 Inter. Com. C. 495.

2 Holmes v. Hunt, 122 Mass. 505; GRAY, C. J.; Kendall v. Kingston, Mass. 524, 534, PARSONS, C. J.; Ogden v. Saunders, 12 Wheat. 213, 262, 3. And see note to § 14.

3 Boyd v. United States, 116 U. S. 616.

4 United States v. McCarthy, 18 Fed. Rep. 87; 21 Blatchf. 469; People v. elly, In re Hackley, 24 N. Y. 74; State v. Warner, 13 La. (Tenn.) 52; United tates v. Brown, 1 Sawy. 531, 536; United States v. Williams, 15 Int. Rev. ec. 199; In re Phillips, 2 Am. Law. T. 154; Wharton on Crim. Ev. § 471.

5 Boyd v. United States, 116 U. S. 616.

6 State v. Nowell, 58 N. H. 514; 9 Rep. 577; Emery's Case, 107 Mass. 172.

7 United States v. McCarthy, 18 Fed. Rep. 87; Kendrick v. Commonwealth, 17 Va. 490.

§ 1067. Penalties for violations of act by carriers.—" SEC. 10 (*As amended*), PAR. 1. That any "common carrier subject to the provisions of this "act, or, whenever such common carrier is a corpora- "tion, any director or officer thereof, or any receiver, "trustee, lessee, agent or person, acting for or em-

"ployed by such corporation, who, alone or w.
"other corporation, company, person, or par
"willfully do or cause to be done, or shall w
"suffer or permit to be done, any act, ma
"thing in this act prohibited or declared to be
"ful, or who shall aid or abet therein, or sha
"fully omit or fail to do any act, matter, or th
"this act required to be done, or shall cause or
"ingly suffer or permit any act, matter, or th
"directed or required by this act to be done not
"so done, or shall aid or abet any such omission or
"ure, or shall be guilty of any infraction of this
"or shall aid or abet therein, shall be deemed g
"of a misdemeanor, and shall, upon conviction t
"of in any district court of the United States wi
"the jurisdiction of which such offense was c
"mitted, be subject to a fine of not to exceed
"thousand dollars for each offense: *Provided*, t
"if the offense for which any person shall be c
"victed as aforesaid shall be an unlawful discrim
"tion in rates, fares, or charges, for the transporta
"of passengers or property, such person shall, in a
"dition to the fine hereinbefore provided for, b
"liable to imprisonment in the penitentiary for a
"term of not exceeding two years, or both such fi
"and imprisonment, in the discretion of the court."

In construing a statute of Iowa,[2] it was held that the word "willfully" does not imply the idea of malice; and if it be shown that the railroad company designedly omitted to do the things enjoined, it will be sufficient to fix its liability to the penalty escribed; and that whether such omission was by ign or through mistake or inadvertence is a

on of fact for the jury.[3] When an agent of a id is prosecuted under this act, it is not ary either to allege or prove that the particu- lawful act complained of was done under au- y conferred by his principal or by its direction; sufficient to show that the accused was in fact ent of a railroad subject to the act, and that rong was committed under the color of his or agency.[4] Underbilling is a device by h a shipper pays for the transportation of a quantity of freight than is actually carried, thereby obtains a reduced rate upon the gross ment; it results in unjust discrimination.[5]

SEC. 10 (*Amended*), PAR. 2. Any common carrier bject to the provisions of this act, or, whenever ch common carrier is a corporation, any officer or ent thereof, or any person acting for or employed y such corporation, who, by means of false billing, lse classification, false weighing, or false report of eight, or by any other device or means, shall nowingly and willfully assist, or shall willingly uffer or permit, any person or persons to obtain ransportation for property at less than the regular ates then established and in force on the line of ransportation of such common carrier, shall be leemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court, for each offense."[6]

"SEC. 10 (*Amended*). PAR 3. Any person ar
"officer or agent of any corporation or compan
"shall deliver property for transportation to an
"mon carrier, subject to the provisions of this a
"for whom as consignor or consignee any such c
"shall transport property, who shall knowingly
"willfully, by false billing, false classification,
"weighing, false representation of the contents o
"package, or false report of weight, or by any
"device or means, whether with or without the
"sent or connivance of the carrier, its agent or age
"obtain transportation for such property at less t
"the regular rates then established and in forc
"the line of transportation, shall be deemed guilty
"f and, which is hereby declared to be a misdemea
"and shall, upon conviction thereof in any cour
"the United States of competent jurisdiction wit
"the district in which such offense was commit
"be subject for each offense to a fine of not exce
"ing five thousand dollars or imprisonment in t
"penitentiary for a term of not exceeding tw
"years, or both, in the discretion of the court."

"SEC. 10 (*Amended*), PAR. 4. If any such perso
"or any officer or agent of any such corporation o
"company, shall, by payment of money or othe
"thing of value, solicitation, or otherwise, induce
"any common carrier subject to the provisions of this
"act, or any of its officers or agents, to discriminate
"unjustly in his, its, or their favor as against any
"other consignor or consignee in the transportation
"of property, or shall aid or abet any common carrier
ny such unjust discrimination, such person or
ficer or agent of such corporation or company
e deemed guilty of a misdemeanor, and shall,

on conviction thereof in any court of the United ates of competent jurisdiction within the district which such offense was committed, be subject to ine of not exceeding five thousand dollars, or imisonment in the penitentiary for a term of not ceeding two years, or both, in the discretion of e court, for each offense; and such person, corration, or company shall also, together with said mmon carrier, be liable, jointly or severally, in action on the case to be brought by any consignor consignee discriminated against, in any court of ie United States of competent jurisdiction for all amages caused by or resulting therefrom."[8]

[8] The proviso to this paragraph was added by the amending act of ch 3, 1889.

Act 1862, chap. 169, § 2.

Fuller v. Chicago etc. R. R. Co. 21 Iowa, 187. See United States v. pool, 14 Fed. Rep. 127.

United States v. Tozer, 37 Fed. Rep. 635; 2 Inter. Com. C. 422; and this case generally for allegations in indictments for offenses against act.

In re Underbilling, 1 Inter. Com. C. 633.

[3] This clause was added by the amending act of March 3, 1889.

[4] This clause was added by the amending act of March 3, 1889.

[5] This clause was added by the amending act of March 3, 1889.

§ 1068. **The Interstate Commerce Commission-s.**—"SEC. 11. That a Commission is hereby created and established, to be known as the Inter-State Commerce Commission, which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, *anno Domini* eighteen hundred and eighty-

"seven, the term of each to be designated by
"President; but their successors shall be appo
"for terms of six years, except that any p
"chosen to fill a vacancy shall be appointed
"for the unexpired time of the commissioner w
"he shall succeed. Any commissioner may b
"moved by the President for inefficiency, ne
"of duty, or malfeasance in office. Not more
"three of the commissioners shall be appointed f
"the same political party. No person in the em
"of or holding any official relation to any com
"carrier subject to the provisions of this act,
"owning stock or bonds thereof, or who is in a
"manner pecuniarily interested therein, shall en
"upon the duties of or hold such office. Said c
"missioners shall not engage in any other busine
"vocation, or employment. No vacancy in t
"Commission shall impair the right of the rema
"ing commissioners to exercise all the powers o
"the Commission."

A commission with somewhat similar powers is established in England.[1] Railway commissions for the enforcement of State laws have uniformly been held to be lawfully created.[2] So the railway commissions of California and Nebraska are held to be constitutional bodies.[3] In Pennsylvania, the State secretary of internal affairs performs similar duties.[4] Congress undoubtedly had power under the commerce clause of the constitution, to create the Commission and give it the powers enumerated in the act.[5] In respect to interstate commerce the Commission may be regarded as the general referee of the courts of the United States, upon which the

ion of enforcing the rights, duties and ob-
s contemplated by the law is conferred.[6]
d commissioners under State statutes, such
, of Iowa, are executive and not judicial
7

ulation of Railways Act, 1873, §§ 4 and 5.
ie v. Farmer's L. & T. Co. 116 U. S. 307.
Const. (1873) Art. XII, § 22; Neb. Const. (1875) Art. , §
Const. (1874), Art. XVII, § 11.
ntucky & Ind. Bridge Co. v. Louisville & N. R. R Co. 37 Fed. Rep.
er. Com. C. 162; Miller v. Mayor of New York, 109 U. S. 385. See,
rgia Railroad v. Railroad Comm'rs, 70 Ga. 694; 71 Ga. 863; Stone v.
L. & T. Co. 116 U. S. 307, 332 *et seq.*; Railroad Comm'rs v. Port-
R. R. Co. 63 Me. 269, 285; Commonwealth v. Eastern R. R. Co.
. 254; State v. Chicago etc. R. R. Co. 19 Neb. 476.
ntucky & Ind. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed.
.
re Railroad Commissioners, 15 Neb. 679.

1069. Powers of the Commission.—"SEC. 12 *amended*), PAR. 1. That the Commission eby created shall have authority to inquire o the management of the business of all com-n carriers subject to the provisions of this act, d shall keep itself informed as to the manner d method in which the same is conducted, and all have the right to obtain from such common rriers full and complete information necessary to nable the Commission to perform the duties and rry out the objects for which it was created; and ne Commission is hereby authorized and required o execute and enforce the provisions of this act; nd, upon the request of the Commission, it shall e the duty of any district attorney of the United States to whom the Commission may apply to nstitute in the proper court and to prosecute nder the direction of the attorney-general of the United States, all necessary proceedings for the

"enforcement of the provisions of this act
"the punishment of all violations thereof;
"costs and expenses of such prosecution
"paid out of the appropriation for the expe
"the courts of the United States; and for t
"poses of this act the Commission shall have
"to require, by subpœna, the attendance and
"mony of witnesses, and the production
"books, papers, tariffs, contracts, agreement
"documents relating to any matter under in
"gation, and in case of disobedience to a sub
"the commission, or any party to a proce
"before the commission, may invoke the aid of
"court of the United States in requiring th
"tendance and testimony of witnesses and the
"duction of books, papers, and documents, u
"the provisions of this section."

The Commission has only administrative pow of supervision and investigation. It is not a co in the proper sense of the term; its conclusions a not final, and it has no authority to enforce the of itself; it hears, investigates and reports up matters brought before it, but, if its findings are n voluntarily obeyed, judicial proceedings in esta lished courts are provided for to compel obedience. It has no authority to establish through routes no to fix through rates, between connecting lines. The Commission has construed the act in respec of its own powers as follows: It cannot make an order or give an opinion in advance of an actual complaint and hearing;[3] nor give opinions on abstract questions;[4] nor will it decide a case upon a theory not presented by the complaint nor advanced

testimony;[5] neither is it clothed with the to order a carrier to furnish any particular ient of cars or any cars at all;[6] but it has ity to institute investigations and to deal iolations of the law independently of a formal iint, or of direct damage to a complainant.[7] ommission has no power to order rates to be sed, upon the ground that they are so low ersistence in making them would be ruinous;[8] it empowered to compel railroad companies ter into joint arrangements with carriers by for through carriage at through rates.[9] The to Regulate Commerce, and practice in the s of the United States, will govern the Com- on in laying down rules for the compulsory uction of books, papers, etc. An application, n made to compel parties not engaged as carriers nterstate commerce, to produce books, papers, should be in writing, accompanied by an affi- it that they contain evidence necessary to make *rima facie* case; and when made to compel one) is a party to the proceeding, and who is a rier engaged in interstate commerce, to produce ks, the affidavit should state that such applica- n is made in good faith.[10] After a case has been ided by the Commission, a petition to open it uld be verified, and should indicate the nature of e new testimony and its purpose, but when a estion of general public interest is involved, the mmission, in its own discretion, may open a case give it a more extended investigation.[11]

"SEC. 12, PAR. 2. And any of the circuit courts of the United States within the jurisdiction of

"which said inquiry is carried on may, in c
"contumacy or refusal to obey a subpœna
"to any common carrier subject to the pro
"of this act, or other person, issue an order
"ing such common carrier or other per
"appear before said Commission (and pr
"books and papers if so ordered), and give ev
"touching the matter in question; and any f
"to obey such order of the court may be pun
"by such court as a contempt thereof. The
"that any such testimony or evidence may
"to criminate the person giving such evidence
"not excuse such witness from testifying; but
"evidence or testimony shall not be used ag
"such person on the trial of any criminal pro
"ing."

1 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. R. 567. As to the right of Congress to confer such powers upon the Commission, see Miller v. New York, 109 U. S. 335; Railroad Comm'rs v. Portland etc. R. R. Co. 63 Me. 269; Commonwealth v. Eastern R. R. Co. 103 Mass. 254; State v. Chicago etc. R. R. Co. 19 Neb. 476; Georgia R. R. v. Railroad Comm'rs, 70 Ga. 694.

2 Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. R. 567. Such power was, however, conferred by the English Act of 1874.

3 In re Inmates of National Homes, 1 Inter. Com. C. 75.

4 Pennsylvania Co. v. Louisville & N. A. R'y Co. 3 Inter. Com. C. 22; 2 Inter Com. C. 603.

5 Martin v. Chicago, B. & Q. R. R. Co. 2 Inter. Com. C. 75.

6 Schofield v. Lake Shore & M. S. R'y Co. 2 Inter Com. C. 92.

7 In re Investigation of Grand Trunk R'y of Canada, 3 Inter. Com. C. 80.

8 In re Chicago, St. P. & K. C. R. R. Co. 2 Inter. Com. C. 231.

9 In re Joint Water and Rail Lines, 2 Inter. Com. C. 645.

10 Rice v. Cincinnati, W. & B. R. R. Co. 3 Inter. Com. C. 186.

11 In re Rice, Robinson & Witherop v. Western N. Y. & P. R. R. Co. 1 Inter. Com. C. 87.

§ 1070. **Complaints and investigations.**— "SEC. 13. That any person, firm, corporation, or "association, or any mercantile, agricultural, or

ufacturing society, or any body politic or icipal organization, complaining of anything e or omitted to be done by any common carrier ject to the provisions of this act, in contraven- of the provisions thereof, may apply to said mmission by petition, which shall briefly state facts; whereupon a statement of the charges s made shall be forwarded by the Commission such common carrier, who shall be called up- to satisfy the complaint or to answer the ne in writing within a reasonable time, to be cified by the Commission. If such common rier, within the time specified, shall make rep- ation for the injury alleged to have been done, d carrier shall be relieved of liability to the mplainant only for the particular violation of w thus complained of. If such carrier shall not tisfy the complaint within the time specified, or ere shall appear to be any reasonable ground for vestigating said complaint, it shall be the duty the Commission to investigate the matters com- lained of in such manner and by such means as shall deem proper. Said Commission shall in ke manner investigate any complaint forwarded y the railroad commissioner or railroad commis- ion of any State or territory, at the request of uch commissioner or Commission, and may insti- ute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct dam- age to the complainant."

Referring to a prevailing impression that the

Commission had power to construe, in- and apply the law by preliminary ju- the Commission said: "A careful read- the act under which this Commission is ized, will show to the petitioners and who have made similar applications that n- diction has been given us to answer question- those under consideration. An expression o- opinion on these subjects at this time, being n- a duty imposed nor a power conferred by the ute, would carry with it no judicial effic- sanction; in fact, would be no more useful t- public or the carrier than the opinion of men upon the same points."[1] The Commi- has a certain discretion to receive and ad- complaints made by parties who have no int- in the matter involved.[2] Persons having an terest in a question pending before the Com- sion will be allowed to appear and be heard w- the case is being submitted, without being m- formal parties.[3] Where one makes complaint s- ting up a personal grievance which he fails t- prove, the Commission may nevertheless, if a v- lation of law by the defendant appears, retain t- case and take such action as may be necessary.[4] On- may complain to the Commission on public grounds of a violation of the act which amounts to a pub- lic grievance, without having any personal interest to be affected by the violation.[5] A petition to re- open a case and for a rehearing, should show *prima facie* that material testimony has been overlooked or misapprehended, or some error in the findings of fact or conclusions of law.[6] After a complaint has been heard and determined by the Commis-

n application for a rehearing made by per- who were not parties to the proceeding will e granted, but if, upon a new or different aint it should appear that its former decision oneous, the Commission will correct it.[7] In and the railway commissioners have full r of permitting the proceedings before them e amended; and will exercise the power lib- y to give effect to the statute.[8]

n re Petition of the Order of Railway Conductors; In re Petition ders and Trave.er's Union, April 18, 1887, Railway Age, April 22, . 282.

Adolph Ottinger v. Southern Pacific R. R. Co. 1 Inter. Com. C. 144.

Hurlburt v. Lake Shore & M. S. R'y Co. 2 Inter. Com. C. 12.

Smith v. Northern Pacific R. R. Co. 1 Inter. Com. C. 203.

Boston & Albany R. R. Co. v. Boston & L. R. R. Co. et al, 1 Inter. C. 158.

Myers v. Pennsylvania R. R. Co. et al. 3 Inter. Com. C. 130.

In re Petition of the Produce Exchange of Toledo, 2 Inter. Com. 8.

Mayor etc. v. S. E. R'y Co. 1 Nev. & Mac. 349.

1071. Findings of Commission as evidence. EC. 14 (*As amended*). That, whenever an inves- igation shall be made by said Commission, it shall e its duty to make a report in writing in respect hereto, which shall include the findings of fact pon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found. All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who

"may have complained, and to any commer
"that may have been complained of. The
"sion may provide for the publication of its
"and decisions in such form and manner as
"best adapted for public information and
"such authorized publications shall be com
"evidence of the reports and decisions of the
"mission therein contained, in all courts o
"United States, and of the several States, wi
"any further proof or authentication thereof.
"commission may also cause to be printed for
"distribution its annual reports." [1]

The constitutional power of the legislature to scribe rules of evidence is well settled.[2] This p has been often exercised by the legislature, with sanction of the courts, so as to change the burde proof, or to affect the question as to what shal deemed *prima facie* evidence.[3] The decided weigh authority is in favor of the constitutionality of leg lation giving *prima facie* force and effect to certa proofs.[4] The constitutionality of the provision i this clause upon this subject has been directly rule upon by a United States court, holding that n valid constitutional objection can be urged against making the findings of the Commission *prima facie* evidence in subsequent judicial proceedings; the provision merely prescribes a rule of evidence which is clearly within the legislative power.[5] A similar provision in a State statute [6] has been upheld.[7]

"SEC. 15. That if in any case in which an investi-
"gation shall be made by said Commission, it shall
"be made to appear to the satisfaction of the Com-

on, either by the testimony of witnesses or r evidence, that anything has been done, or ted to be done, in violation of the provisions iis act, or of any law cognizable by said com- sion, by any common carrier, or that any injury amage has been sustained by the party or par- complaining, or by other parties aggrieved in sequence of any such violation, it shall be the y of the commission to forthwith cause a copy its report in respect thereto to be delivered to h common carrier, together with a notice to said mmon carrier to cease and desist from such vio- ion, or to make reparation for the injury so found have been done, or both, within a reasonable me, to be specified by the commission; and if, ithin the time specified, it shall be made to appear the commission that such common carrier has eased from such violation of law, and has made eparation for the injury found to have been done, n compliance with the report and notice of the Commission, or to the satisfaction of the party com- plaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

1 The last paragraph was added by the amending act of March 3, 1889.

2 PARSONS, C. J., in Kendall v. Kingsdon, 5 Mass. 524, 531; WASHINGTON, J., and MARSHALL, C. J., in Ogden v. Saunders, 12 Wheat. 213, 12, 349; Board v. Merchant, 103 N. Y. 143; S. C. 34 Alb. Law J. 384.

3 Goshen v. Richmond, 4 Allen, 458; Monson v. Palmer, 8 Allen, 551, 56; Howard v. Moot, 64 N. Y. 262, 263; Doyle v. Doyle, 53 N. H. 567; Perkins v. Scott, 57 N. H. 55; Brown v. Kemball, 12 Vt. 617; Stoddard v. Chapin, 15 Vt. 443. See Lee v. Tillotson, 24 Wend. 337, in connection with 2 Paine, 583.

4 Holmes v. Hunt, 122 Mass. 505: Matthews v. Offley, 3 Sum. 115. And see Lazarus v. Commonwealth Ins. Co. 19 Pick. 81; Lock v. Bennett, 7 Cush. 445, 453; Nolan v. Collins, 112 Mass. 12; Fair v. Manhattan Ins. Co.

"exceeding for each carrier or person in default the "sum of five hundred dollars for every day, after a "day to be named in the order, that such carrier or "other person shall fail to obey such injunction or "other proper process, mandatory or otherwise; and "such moneys shall be payable as the court shall di- "rect, either to the party complaining or into court, "to abide the ultimate decision of the court, or into "the treasury; and payment thereof may, without "prejudice to any other mode of recovering the same, "be enforced by attachment or order in the nature "of a writ of execution, in like manner as if the "same had been recovered by a final decree *in per-* "*sonam* in such court. When the subject in dispute "shall be of the value of two thousand dollars or "more, either party to such proceeding before said "court may appeal to the Supreme Court of the "United States, under the same regulations now "provided by law in respect of security for such ap- "peal; but such appeal shall not operate to stay or "supersede the order of the court or the execution of "any writ or process thereon; and such court may, "in every such matter, order the payment of such "costs and counsel fees as shall be deemed reasona- "ble. Whenever any such petition shall be filed or "presented by the Commission, it shall be the duty of "the district attorney, under the direction of the "attorney-general of the United States, to prose- "cute the same; and the costs and expenses of such "prosecution shall be paid out of the appropriation "for the expenses of the courts of the United States."

The United States courts are not the mere executioners of the orders or recommendations of the

mission; they hear and determine causes *de* o upon pleadings and proofs, among which may included the facts found by the Commission, ch are to be received *prima facie*.[1] Their juris- ion over actions for violations of the Interstate merce Act is not dependent on the fact of di- se citizenship.[2] Where the right asserted arises is claimed under this law, it is sufficient to tain the court's jurisdiction, independent of the zenship of the parties to the controversy, since nvolves a federal question.[3] In England the rts enforce obedience to the statute by injunc- n,[4] and it is there considered that previously to application for an injunction against a railway pany, the complainant ought to make a full rep- ntation of the grievance of which he seeks re- ss to the company.[5]

'SEC. 16. PAR. 2. If the matters involved in ny such order or requirement of said Com- ission are founded upon a controversy requiring trial by jury, as provided by the seventh amend- ent to the Constitution of the United States, nd any such common carrier shall violate or efuse or neglect to obey or perform the same, fter notice given by said Commission as provided n the fifteenth section of this act, it shall be law- ul for any company or person interested in such rder or requirement to apply in a summary way y petition to the circuit court of the United States itting as a court of law in the judicial district in hich the carrier complained of has its principal ffice, or in which the violation or disobedience of uch order or requirement shall happen, alleging

"such violation or disobedience as the case m
"and said court shall by its order then fix
"and place for the trial of said cause, whic
"not be less than twenty, nor more than forty
"from the time said order is made, and it sh
"the duty of the marshal of the district in
"said proceeding is pending to forthwith serve
"of said petition, and of said order, upon each
"defendants, and it shall be the duty of the de
"ants to file their answers to said petition w
"ten days after the service of the same upon th
"aforesaid. At the trial the findings of fact of
"Commission as set forth in its report shall be *p*
"*facie* evidence of the matters therein stated, a
"either party shall demand a jury or shall omi
"waive a jury, the court shall, by its order, di
"the marshal forthwith to summon a jury to try
"cause; but if all the parties shall waive a jury
"writing, then the court shall try the issues in
"cause and render its judgment thereon. If the
"ject in dispute shall be of the value of two th
"sand dollars or more, either party may appea
"the Supreme Court of the United States under th
"same regulations now provided by law in respect
"security for such appeal; but such appeal must
"taken within twenty days from the day of the en
"dition of the judgment of said circuit court. If t
"judgment of the circuit court shall be in favor o
"the party complaining, he or they shall be entitle
"to recover a reasonable counsel or attorney's fee, t
"be fixed by the court, which shall be collected a
"part of the costs in the case. For the purposes of
"this act, excepting its penal provisions, the circuit
"courts of the United States shall be deemed to be
"always in session."[6]

Kentucky & I Bridge Co. v. Louisville & N. R. R. Co. 37 Fed. 567.

Connor v. Vicksburg & Meridian R. R. Co. — Fed. Rep. —; S. C. 2 Com. C. 177.

Kentucky & I. Bridge Co. v. Louisville N. R. R. Co. 37 Fed. 567.

Macfarlane v. North British R'y Co. (No. 2) 4 R'y & Can. Traf. 265.

Cooper v. London etc. R'y Co. 4 Jur. N. S. Com. P. 762.

This clause, except the last sentence, was added by the amending f March 3, 1889.

1073. Interstate Commerce Commission—rm of procedure.—"SEC. 17 *(As amended).* hat the Commission may conduct its proceedings n such manner as will best conduce to the proper ispatch of business and to the ends of justice, majority of the commission shall constitute a uorum for the transaction of business, but no Commissioner shall participate in any hearing or roceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or mend such general rules or orders as may be equisite for the order and regulation of proceedngs before it, including forms of notices and the ervice thereof, which shall conform, as nearly as nay be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall e entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpœnas."

"SEC. 18 *(As amended).* That each commis-

"sioner shall receive an annual salary of
"thousand five hundred dollars, payable in
"same manner as the judges of the courts of
"United States. The Commission shall appo
"secretary, who shall receive an annual sala
"three thousand five hundred dollars, paya
"like manner. The Commission shall have au
"ity to employ and fix the compensation of
"other employees as it may find necessary to
"proper performance of its duties. Until ot
"wise provided by law, the Commission may
"suitable offices for its use, and shall have autho
"to procure all necessary office supplies. W
"nesses summoned before the Commission sha
"paid the same fees and mileage that are p
"witnesses in the courts of the United States.
"of the expenses of the Commission, including
"necessary expenses for transportation incurred
"the commissioners, or by their employees un
"their orders, in making any investigation,
"upon official business in any other places th
"in the city of Washington, shall be allowed an
"paid on the presentation of itemized vouchers
"therefor approved by the chairman of the Com-
"mission."

"SEC. 19. That the principal office of the Com-
"mission shall be in the city of Washington, where
"its general sessions shall be held; but whenever
"the convenience of the public or the parties may
"be promoted or delay or expense prevented there-
"by, the Commission may hold special sessions in
"any part of the United States. It may, by one or
"more of the commissioners, prosecute any inquiry
"necessary to its duties, in any part of the United

ıtes, into any matter or question of fact per-
ning to the business of any common carrier
ject to the provisions of this act."

1074. Carriers to make annual reports to the ımission.—"SEC. 20. That the Commission is reby authorized to require annual reports from . common carriers subject to the provisions of this t, to fix the time and prescribe the manner in ich such reports shall be made, and to require om such carriers specific answers to all questions on which the Commission may need information; ich annual reports shall show in detail the nount of capital stock issued, the amounts paid erefor, and the manner of payment for the same; e dividends paid, the surplus fund, if any, and e number of stockholders; the funded and floating ebts and the interest paid thereon; the cost and alue of the carrier's property, franchises, and quipments; the number of employees and the ılaries paid each class; the amounts expended for nprovements each year, how expended, and the haracter of such improvements; the earnings and eceipts from each branch of business and from all ources, the operating and other expenses; the alances of profit and loss; and a complete exhibit f the financial operations of the carrier each year, ncluding an annual balance-sheet. Such reports hall also contain such information in relation to ates or regulations concerning fares or freights, or greements, arrangements, or contracts with other ommon carriers, as the Commission may require; nd the said Commission may, within its discretion, or the purpose of enabling it the better to carry out

"the purposes of this act, prescribe (if in the opi
"of the Commission it is practicable to prescribe
"uniformity and methods of keeping accounts
"period of time within which all common carr
"subject to the provisions of this act shall have
"near as may be, a uniform system of accounts,
"the manner in which such accounts shall be ke

Whether under a State statute a railroad compa can be required to make a report of or give inform tion in regard to its business outside of the St has been before the Supreme Court of the Uni States, but was not decided.[1] In deciding upon form and requisites of these reports, so far as it w in the discretion of the Commission to do so, thr points were suggested to be kept especially in vie First, to make them as concise as possible consiste with the information to be furnished; second, bring them as nearly as possible into conformity wi the best forms required in the reports called for b State laws or State commissions; third, to have the reports made as late in the year as possible, an still leave time for tabulating and condensing the information furnished in the annual report to be made by the Commission.[2]

"SEC. 21 (*As amended*). That the Commission "shall, on or before the first day of December in "each year, make a report, which shall be trans- "mitted to Congress, and copies of which shall be "distributed as are the other reports transmitted to "Congress. This report shall contain such inform- "ation and data collected by the Commission as "may be considered of value in the determination

questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary, and the names and compensation of the persons employed by said commission."

Stone v. Farmers' L. & T. Co. 116 U. S. 307, 331, 332.

Annual Reports from Carriers, 1 Inter. Com. C. 301. The subject discussed in Report of Commission: 2 Inter. Com. C. 490.

§ 1075. **Reduced rates—Free passes.**—"SEC. 22. (*As amended*). That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from ex-

"changing passes or tickets with other railroad co
"panies for their officers or employees; and noth
"in this act contained shall in any way abridge
"alter the remedies now existing at common law
"by statute, but the provisions of this act are in
"dition to such remedies: *Provided*, that no pend
"litigation shall in any way be affected by this a

When the government contracts for the delivery the supplies needed for the Indian service, and t advertises for bids for their transportation from points of delivery to the points where they are be made use of, this transportation at the cost the government is "for the United States" wi in the meaning of this section, and is not requir to be made at the regular published rates.[1] T transportation of fish and fish eggs by the Unit States Commission of Fish and Fisheries falls wit in the exception contained in this section.[2] A common law, harmless discrimination may be in dulged in; the carrying of one person, who is u able to pay fare, free, is no injustice to other pa sengers who may be required to pay the reasonab and regular rates fixed by the company. N would the carrying of supplies at nominal rate to communities scourged by disease, or rendered destitute by floods or other casualty, entitle othe communities to have their supplies carried at th same rate.[3] The Commission has declined to decid whether it is competent for the carriers subject t it to grant free transportation of persons to those who are proper subjects of charity, when no con troversy was pending before it, which involved the question.[4] The provision that nothing in this sec

. shall apply to "the issuance of mileage, ex-
sion or commutation passenger tickets," while
horizing the issuance of such tickets, does not
eve the carriers as to rates charged from the re-
rements of reasonableness and impartiality, which
prescribed in other parts of the act.[5] They
st be sold impartially to all the public who ap-
for them, and cannot be sold to a particular
ss of persons, *e. g.* commercial travelers, at lower
es than are charged to others.[6] The fact that
eage tickets sold to a particular class of travel-
contain a special contract limiting the liability
the carrier, will not justify a lower rate than is
rged the public, where the offer of the lower
e is not made to all who will accept the special
tract.[7] Mileage, excursion and commutation
ssenger tickets being issued for different purposes,
price for each is determined from special con-
erations.[8] The exception of the officers and em-
yees of railroad companies as to the issue of
sses does not include their families.[9]

. In re Indian Supplies, 11 Inter. Com. C. 15.
In re United States Commission of Fish and Fisheries, 1 Inter. Com.
L.
Hays v. Pennsylvania Co. 12 Fed. Rep. 309.
In re Disabled Soldiers and Sailors, 1 Inter. Com. C. 28.
Louis Larrison v. Chicago & G. T. R. R. Co. 1 Inter. Com. C. 147.
Louis Larrison v. Chicago & G. T. R. R Co. 1 Inter. Com. C. 147.
Louis Larrison v. Chicago & G. T. R. R. Co. 1 Inter. Com. C. 147.
Associated Wholesale Grocers of St. Louis v. Missouri Pacific R'y
1 Inter. Com. C. 156.
Ex parte Koehler, 31 Fed. Rep. 315.

§ 1076. **Mandamus to compel movement of affic, etc.**—"(*New section*). That the circuit and district courts of the United States shall have

"jurisdiction upon the relation of any person or
"sons, firm, or corporation, alleging such viola
"by a common carrier, of any of the provision
"the act to which this is a supplement and all a
"amendatory thereof, as prevents the relator fr
"having interstate traffic moved by said comm
"carrier at the same rates as are charged, or u
"terms or conditions as favorable, as those given
"said common carrier for like traffic under simi
"conditions to any other shipper, to issue a writ
"writs of mandamus against said common carri
"commanding such common carrier to move a
"transport the traffic, or to furnish cars or oth
"facilities for transportation for the party applyin
"for the writ: *Provided*, that if any question of fa
"as to the proper compensation to the common ca
"rier for the service to be enforced by the writ i
"raised by the pleadings, the writ of peremptor
"mandamus may issue, notwithstanding such que
"tion of fact is undetermined, upon such terms a
"to security, payment of money into the court, o
"otherwise, as the court may think proper, pendin
"the determination of the question of fact: *Provide*
"That the remedy hereby given by writ of man
"damus shall be cumulative, and shall not be hel
"to exclude or interfere with other remedies pro
"vided by this act or the act to which it is a supple
"ment."[1]

This section does not authorize the court to gran
relief where a case of unjust discrimination is no
made out.[2] The original act contained a clause in
the sixth section, providing that if carriers should
neglect or refuse to file or publish its schedules or

ffs of rates, fares and charges as provided in
; section, it should be subject to the writ of
ıdamus to be issued by a United States circuit
rt, in the name of the people of the United
tes, at the relation of the Commission. Similar
visions have been held to be remedial rather
n penal.[3] It has also been held that a court
y determine whether a station is necessary in a
rn, and may enforce its erection by mandamus.[4]

This section was added by the amending act of March 3, 1889. In original act, section 23 provided an appropriation for the purposes of act, and section 24 designated when the act should go into effect.

United States v. Delaware, L. & W. R. R. Co. 40 Fed. Rep. 101 (1889); ıter. Com. C. 617.

Stockwell v. United States, 13 Wall. 531.

State v. Republican Valley R. R. Co. 17 Neb. 647, affirmed 18 Neb. See State v. Chicago etc. R. R. Co. 19 Neb. 476.

INDEX.

INDEX.

[The references are to sections.]

ɔandonment of Railway. See RIGHT OF WAY.
ɔandonment of Shares. See SURRENDER OF SHARES.
ɔandonment of Undertaking. See RIGHT OF WAY and SUBSCRIPTIONS TO STOCK.
ɔuse of Franchises. See FORFEITURE OF CHARTER.
ɔceptance of Charter. See CHARTERS.
ɔcess, obstructing access to lands, 818.
to streams, 823.
to mills, 823.
ɔcident. See INJURIES TO PASSENGERS.
ɔquisitions (Future). See MORTGAGES.
ɔt of God, meaning and extent of the term, 922.
injuries to goods resulting from, 922.
duty of carrier notwithstanding, 923.
ɔditional Land. See MORTGAGES.
ɔditional Capital. See INCREASE OF CAPITAL STOCK.
ɔddress Book. See SHAREHOLDERS.
ɔdjoining Land. See EMINENT DOMAIN.
ɔdjoining Owners. See EMINENT DOMAIN.
ɔdjourned Meetings. See DIRECTORS' MEETINGS and SHAREHOLDERS' MEETINGS.
ɔdoption of Contracts. See PROMOTERS.
ɔfter-acquired Property. See MORTGAGES.
ɔdministrator. See EXECUTORS and ADMINISTRATORS.
ɔgents of Corporations. See CORPORATE AGENTS.
ɔgents of Natural Persons, intrusted with stock for specific purpose, 362.
transfer of stock by, in excess of authority, 362.
liability of corporation permitting registration, 362.

Agreements (Working). See RUNNING PRIVILEGE
Allotment of Shares. See SUBSCRIPTIONS TO STOCK.
Amalgamation. See CONSOLIDATION.
Amendments. See CHARTERS.
Ancillary Companies. See EXPRESS COMPANIES, SLEEPING-CAR COMPANIES.
fostering of. See ULTRA VIRES.
Animals. See CARRIERS OF LIVE STOCK, and TOLLS.
Annual Meetings. See SHAREHOLDERS' MEETINGS and DIRECTORS' MEETINGS.
Appliances. See INJURIES TO PASSENGERS, and TOLLS.
Apportionment of Shares. See SUBSCRIPTIONS TO STOCK.
Appraisal. See EMINENT DOMAIN.
Arrangements of Traffic. See TRAFFIC AGREEMENTS AND ASSOCIATIONS.
Arrears. See DIVIDENDS.
Articles of Association, under general incorporation laws, 33.
formal requisites of, 33.
under the New York General Railroad Act of 1850, 33.
defective articles under, how cured, 37.
under the English Railways Construction Facilities Act, 39.
effect of signing, as a subscription to stock, 75.
when blanks remain unfilled, 75.
recitals in, as rendering subscriptions conditional, 95.
See CHARTERS.
Assaults. See INJURIES TO PASSENGERS.
Assessment of Damages. See EMINENT DOMAIN.
Assessments, often synonymous with "calls," 146. See CALLS.
beyond par value of stock, 146.
not to be made without statutory authority, 146.
"non-assessable" stock, 146.
is subject to calls, 146.
Assignee in Bankruptcy, authority to make and enforce calls, 152.
Assignee in Insolvency, sale of stock of assignor, 363.
liability of corporation permitting registration, 363.
ignment of Stock. See TRANSFER OF STOCK.

ttaching Creditors. See UNSECURED CREDITORS.
ttachment, of shares of stock, 375.
by creditors of transferrer, 375.
registration of transfer as affecting, 375, 376.
the New England rule, 375.
the New York rule, 376.
the Federal rule, 376.
the English rule, 376.
ttorney-General, suits by, against corporations. See FORFEITURE OF CHARTER.
uditors, authority of, respecting dividends, under 8 Vict., ch. 16, 307.
uxiliary Companies. See EXPRESS COMPANIES, and SLEEPING CAR COMPANIES.
fostering of. See ULTRA VIRES.
ward. See EMINENT DOMAIN.
Baggage, liability of carriers of passengers for, 897.
lien of carrier upon, 897.
conversion of, 897.
beginning of carrier's liability for, 898.
definition of, 899.
illustrations of, what constitutes, 899, 900.
knowledge of contents as affecting carrier's liability, 901.
limit of weight and value, 902.
extra charges for excess, 902.
checks for, 903.
liability of connecting carriers, 904.
of initial carrier, 905.
of intermediate and terminal carriers, 906.
of sleeping-car companies for, 908, 909.
delay in delivery, 910.
measure of damages, 910.
exemplary damages, 910.
notices and stipulations against liability, 911.
termination of liability for, 912.
Baggage Checks. See BAGGAGE.
Bailee of Goods. See COMMON CARRIERS OF THINGS.
Bankruptcy. See ASSIGNEE IN BANKRUPTCY.
Bankruptcy Act (English), status of shares as things in action under, 62.
Bell. See SIGNALS OF WARNING.

Benefits, Resulting, whether to be considered award for condemnation of lands, 827.
Bills of Exchange, liability of directors upon, 61.
Bills of Lading, delivery of goods without production of, 917, 951.
departure from directions of, as to delivery, 93.
as evidence of acceptance of goods, 944.
signing of, as indicating beginning of transit, 91.
definition of, 951.
made in triplicate, 951.
which copy controls, 951.
terms not to be varied by parol, 951.
ignorance of terms, 951.
original verbal contract not merged in, 951, 963.
attachment of, to draft drawn on consignee, 951.
parol evidence to explain ambiguity, 951.
to rebut false recitals, 951.
quasi-negotiable nature of, 951.
production and surrender of, by party claiming go. 951.
attachment of, to draft drawn on consignee, 951.
reservation in, of benefit of owner's insurance, 95.
stipulations in, against common law liability, 962.
prior verbal contract not merged in, 963.
valuation of goods in, when conclusive against assignor, 964.
assessment of partial injury, 964.
valuation of goods in, when not conclusive, 949.
Blank (Assignment of Shares in). See TRANSFER OF STOCK.
Blasting, injuries to property from, 826.
Board of Trade, application to, for certificate of incorporation, 39.
Bondholders, have no standing in court until mortgage trustees decline to act, 627.
bound by acts of mortgage trustees in absence of fraud, 627.
mutual obligations of, 657.
right to bring suit upon failure of mortgage trustee to act, 667.
provisions in decree of sale for purchase by, 686.
distribution of proceeds of sale among, 690.

ɔndholders—(*continued*).
distribution of proceeds of sale among, no priority between holders of bonds and coupons, 691.
power of majority in reorganization schemes, 770.
onds, Lloyd's bonds, 605.
to secure current obligations, 605.
authorized for one purpose, not to be issued for another, 606.
allegations in suit upon, 606.
personal liability of directors upon, 611.
authority of railway to guaranty municipal bonds, 607.
bonds of leased road, 607.
bonds received in payment of debts, 607.
secured by unauthorized mortgage, 609.
secured by *ultra vires* mortgage, 610.
unsecured by mortgage, 613.
enforcement of, as equitable mortgage, 613.
fractional part of, under refunding scheme, 613.
secured by statutory lien, 614.
formal mortgage unnecessary, 614.
cover after-acquired property, 614.
waiver of lien, 614.
foreclosure upon, 614.
income bonds, 631.
interest payable out of net earnings, 632.
convertible into stock, 633.
recitals in bonds and coupons, 634.
fraud and irregularities in issue of, 635.
issue of, without consideration, 635.
issue of, below par, 636.
rights of purchaser at discount, 636.
registration of, 637.
negotiable nature of bonds and coupons, 638.
the American rule, 638.
the English rule, 639.
requisite certainties of negotiability, 640.
effect of absence of negotiable words in coupons, 641.
whether doctrine of *lis pendens* applicable to, 642.
loss or theft as affecting transfer, 643.
liability of assignor, 644.

negotiable nature of State-aid bonds and coupons
equities arising from negotiation of, 6
detachment of coupons, 646.
presentation and demand, 647.
time of payment, 648.
days of grace, 649.
effect of maturity upon, 650.
interest upon after maturity, 651.
distinction between purchase and payment of coupons, 652.
intention of the parties as determining, 653.
statutes of limitation, 654.
as affecting coupons, 654.
no priority over coupons secured by same mortgage, 691.
Books. See CORPORATE BOOKS.
Borrowing Powers. See MORTGAGES.
Bribery, to quiet opposition to charter, 20.
to procure proxy to vote, 452.
to influence vote of shareholder, 452.
Bridges, authority to build implies power to condemn land for approaches, 30.
injuries to riparian rights in constructing, 823.
Brokers. See STOCK BROKERS.
Buildings, condemnation of, 814.
By-Laws, to be made by shareholders, 404, 405.
to conform to law of the land, 405.
as affected by consolidation, 544.
Calls, tender of stock certificate, when condition precedent to enforcement of, 124.
payment of, as waiver of defense to subscription, 145.
definitions of, 145.
not to be made until number of shares determined, 145.
not to be made except for legal object, 145.
not payable upon stock subsequently subscribed, 145.
not to be offset against debt due subscriber, 145.
not to be postponed for private advantage of directors, 145.
not to be indefinitely postponed, 145.
upon "non-assessable" stock, 146.

Calls—(*continued*).
payment of subscription before call, 147.
interest to be allowed upon, 147.
enforcement of under 8 Vict. ch. 16, 148.
notice of under 8 Vict. ch. 16, 148, 160.
provisions respecting under New York statute, 148.
no prescribed form of making, 149.
errors in making, 149.
directors participating in making estopped, 149.
shareholders acquiescing in informalities estopped, 149.
when name of corporation has been changed, 149.
necessary to render obligation to pay absolute, 150, 151.
unnecessary when time of payment already fixed, 151.
unnecessary upon insolvency of corporation, 152, 430.
mandamus to compel, 152.
by court of equity, 152.
filing of creditors' bill equivalent to, 152.
to be impartial and uniform, 153.
necessity of, not to be questioned, 154.
to be made by directors, 155.
unless otherwise provided in charter, 155.
by majority vote, 156.
quorum being present at meeting, 156.
by directors *de facto*, 156.
delegation of authority to make, 157.
assignment and mortgage of authority to make, 158.
amount of, 159.
at common law, 159.
under 8 Vict. ch. 16, 159.
evasion of restrictions upon, 159.
time of making, 159.
time of payment, 160, 161.
place of payment, 160.
to whom payable, 160.
payable in installments, 161.
notice of, 160, 161.
time of, 160.
provisions respecting to be strictly observed, 160.
to specify time of payment, 160.
place of payment, 160.
person to whom payable, 160.
when necessary to give, 161.

Calls (*continued*).
notice of, statutes requiring, 162.
whether a condition precedent to suit, 162.
to be actual, 163.
no prescribed form, 163.
by publication, 164.
to be brought to knowledge of shareh. 164.
evidence of giving, 165.
informalities in may be waived, 169.
evidence of making, 166.
liability to pay, 167.
how proven, 167.
registration books as evidence of, 167.
liability of infants to pay, 167.
liability of pledgee of shares to pay, 167.
liability of trustees to pay, 167.
interest upon, 168.
waiver of, 169.
to be clearly proven, 169.
suits upon non-payment of, 169.
after notice, demand not prerequisite, 169.
pleading, 170.
limitations upon, 170.
action for breach of contract, 171.
measure of damages, 170.
action in assumpsit, 171.
other remedies of corporation upon non-payment of 171.
strict foreclosure, 171.
forfeiture, 171. See FORFEITURE OF STOCK.
as affected by consolidation, 546.
Cancellation. See SUBSCRIPTIONS TO STOCK.
Capital Stock, reduction of, 47, 315-327.
amendment of charter authorizing, 47. See REDUCTION OF CAPITAL STOCK.
definition of, 59.
distinguished from property of corporation, 59.
the several kinds of. See SHARES OF STOCK.
issue of shares in excess of, 63.
subscriptions to. See SUBSCRIPTIONS TO STOCK.
not to be distributed as dividends, 297.

Capital Stock—(*continued*).
not to be distributed, except where it has been reduced, 297.
injunction to restrain, 297.
recovery of after payment, 297.
increase of, 46, 47, 315–326.
amendment of charter authorizing, 47.
to be authorized by shareholders, 46. See INCREASE OF CAPITAL STOCK.
acquisition of whole of, by one person, 575.
not a dissolution of corporation, 575.
partial ownership by State or federal government, 23.
effect upon private nature of company, 23.
Carriers by Water, competition with. See INTERSTATE COMMERCE.
Carriers of Goods. See COMMON CARRIERS OF THINGS.
Carriers of Live Stock, duty to supply safe and suitable cars, 927, 935.
may compensate shipper for services, 943.
liability of, for delay, 943.
measure of damages, 943.
special damages. 948.
Carriers of Passengers, definition of common carrier, 853.
obligations of, 854.
to receive and carry all persons alike, 854.
exceptions to, 854.
discrimination between persons, 855.
to warn passengers of danger, 862.
to supply necessary information, 862.
to supply seats, 863.
to treat sick and infirm humanely, 864.
to carry upon schedule time, 865.
to allow time for boarding and alighting, 866.
to carry to destination, 867.
through trains and local travel, 868.
relation of carrier and passenger, 856.
how created, 856.
as to persons on freight trains, locomotives, *et cetera*. 857.
as to persons on trains for special purposes, 858.
beginning of, 859.

Carriers of Passengers—(*continued*).
relation of carrier and passenger, **termination** of
duties of passengers, 860, 861.
to observe rules and regulations, **860, 861, 882.**
to exhibit ticket when requested, **876.**
to conduct themselves in orderly **fashion, 880.**
to pay or tender ticket, 881.
expulsion of passengers, 879.
the right and duty of the **carrier herein, 879**
to preserve public peace, **morals and health,**
for refusal to pay or present **ticket,**
tender of fare after, 884.
for violation of rules and **regulations, 882.**
for breach of contract of carriage, **883.**
place of, at common law, 885.
statutory regulations, 886.
damages for, wrongful, 887.
damages for unnecessary violence **in, 888, 889.**
elements of damage, 890.
mental suffering, 891.
shame and humiliation, **891.**
quantum of damages, 892.
punitive or exemplary damages, **893, 894.**
for expulsion without violence or **insult,**
mitigation of damages, 896.
liability for passengers' baggage, 897–912. See BAGGAGE.
Carriers of Things. See COMMON CARRIERS OF THINGS.
Cars, duty of carrier to supply sufficient, safe and suitable. See CARRIERS OF PASSENGERS and COMMON CARRIERS OF THINGS.
Car Trusts. See ROLLING STOCK.
Cattle. See CARRIERS OF LIVE STOCK, and TORTS.
Cattle Guards, duty of railway to maintain, 969.
Cattle Passes, duty of railway to maintain, 969.
Certificates of Stock, definition of, 61.
distinguished from stock, 61.
possession of not requisite to **ownership of stock,** 61, 124.
to voting, 61.
to incurring liability, 61.
to receiving dividends, 61.

tificates of Stock—(*continued*).
possession not requisite to transfer of stock, 61.
subscriber's right to demand, 91.
failure to issue, 91.
effect of, upon liability of subscriber, 91, 124.
tender of, when condition precedent to enforcement of call, 124.
loss or theft of, 364.
right of owner to new certificates, 364.
cancellation of, upon registration of transfer, 379.
issue of new, upon registration of transfer, 379.
what equivalent to new, 379.
transfer of shares prior to issue of, 381.
surrender of, upon registration of transfer, 383.
essential to protection of corporation, 384, 401.
rights of holder of, as against transferrer, 400.
liability of corporation not requiring surrender of, 401.
rights of registered transferree as against holder of, 402.
his remedy, 403.
Chancery Jurisdiction, in appointment of receivers, 708.
in proceedings to forfeit charter, 592.
Change of Location, of railway, effect of, 791. See LOCATION.
Charges for Transportation. See TOLLS AND TARIFFS.
Charges upon Realty, consolidated company not purchaser without notice, 562.
Charters, the source of corporate powers, 27.
as tripartite contracts, 27.
between the corporation and its shareholders, 27.
between the corporation and the state, 27.
State laws not to impair, 27.
transcendal power of parliament herein, 27.
between the State and shareholders, 27.
preventing repeal, 27.
preventing forfeiture save by judicial proceedings, 27.
acceptance of, 28.
requisite to render effective, 28.
presumed from application for, 28.

Charters—(*continued*).
acceptance of, at meeting in a foreign **State, 28.**
how far construed against grantee, 29.
express and implied powers granted by, **29, 30.**
construction of exclusive grants, 29.
construction of power to fix rates, **942.**
powers implied from authority to build **railway,** 30.
powers implied from authority to build **bridge,** 30.
conditions annexed to, 31.
requiring consent of city to **construction** of railway, 31.
respecting subscriptions to stock, **31, 48.**
respecting payment of subscriptions, **31.**
substantial compliance sufficient, **31.**
in property instead of money, 31.
in bonds instead of money, 31.
under the New York General **Railroad Act** of 1850, 38.
under the English Railways Construction Facilities Act, 39.
special grants of, prohibited by State **constitutions,** 32.
exception in favor of railways, 32.
amendment and repeal of, 40.
consent of corporation requisite, 40.
under reservation of power to amend, **40.**
provisions of State constitutions concerning, **41.**
waiver of reserved right, 41.
restrictions upon reserved right, 42.
not to be affected by implication, 42.
not to affect rights of shareholders *inter se*, 43, 44.
consent of shareholders, 43-45.
not requisite, to incidental amendments, 45.
requisite, to fundamental amendments, 45.
power of majority, 45.
incidental and fundamental **amendments,** 47.
distinction between, 47.
examples of, 47, 48.
shareholder's remedy against, 49.
rights of dissenting minority, **46.**
release from liability upon subscription by fundamental amendment, 120, 121.

harters—(*continued*).
repeal of, 40.
for mis-user and non-user, 40.
power of legislature, how far reviewable by the courts, 40.
contracts to quiet opposition to granting of, 19, 20.
whether in the nature of a bribe, 20.
petitions in equity to quiet opposition to, 21.
colorable compliance with provisions of, 25.
recitals in, as rendering subscriptions conditional, 95.
expiration of, 577.
dissolution of corporation, 577.
surrender of, 578.
dissolution of corporation, 578.
acceptance of, by State, 579.
forfeiture of, 40.
for mis-user and non-user, 23, 40.
the corporation entitled to be heard, 42. See FORFEITURE OF CHARTERS.
hecks. See BAGGAGE, and TICKETS.
hildren, injuries to, 974.
hoses in Action, shares of stock as, 62.
effect of consolidation upon, 550.
ities, running of trains through, 970. See also MUNICIPAL AID, EMINENT DOMAIN, and STREETS.
losing of Register. See TRANSFER BOOKS.
ollision, presumption of negligence from, 976.
olorable Subscriptions, to influence others, 129.
ombinations among Shareholders, to control corporation, 451.
legality of, 451.
transfer of shares to trustees, 451.
issue of trust certificates in lieu of, 451.
revocable nature of, 451.
injunction to restrain, refused, 451.
of different corporations, 588, 589.
how far imputable to corporations, 589.
as a ground of forfeiture of charter, 588, 589.
Combinations between Corporations, corporations not to form partnerships, 529.
management of two corporations not to be placed under one control, 529.

Combinations between Corporations—(*continued*)
such contracts revocable at pleasure, 529.
as a ground of forfeiture of charter, 588, 589.
Commerce among the States. See INTERSTATE COMMERCE.
Commission (Interstate). See INTERSTATE COMMERCE.
Commission (State Railway). See RAILWAY COMMISSIONS, and GOVERNMENTAL CONTROL.
Commissioners in Condemnation Proceedings. See EMINENT DOMAIN.
Commissioners to Take Subscriptions, competency of, to subscribe, 80.
not to allow themselves preference, 80.
sessions of, to be public, 80.
general powers of, 84.
ministerial function of, 84.
judicial function of, 84.
discretion of, 84.
failure of, to take statutory oath, 84.
duty of, to apportion subscriptions in excess of capital stock, 92.
no authority to accept conditional subscriptions, 94
Common Carriers, railways declared to be, by State constitutions, 22.
limitations of liability prohibited by Nebraska constitution, 22.
public function of, 23.
refusal to carry, 23.
discrimination, 23. See CARRIERS OF PASSENGERS, CARRIERS OF LIVE STOCK, and COMMON CARRIERS OF THINGS.
Common Carriers of Things, definition, 913.
acting as private carrier, 913.
beginning of liability, 914.
acceptance of goods by agent, 914.
delivery of goods, 915.
placing cars in convenient position, 915.
to agent of consignor, 915.
at point beyond terminus, 920.
refusal of consignee to accept, 924.
duty in each case, 924.

Common Carriers of Things—(*continued*).
non-delivery, 915.
evidence of, 915.
notification of consignee, 916.
connecting carriers, 917-920.
delivery to, 914.
selection of, by initial carrier, 918.
designation of, by consignor, 918.
liability of, 919, 920.
initial carrier as agent of consignor, 919.
termination of liability, 915, 916.
by actual delivery, 915.
by constructive delivery, 915, 916.
by delivery to connecting carrier, 917.
by partial delivery, 937.
by refusal of consignee to accept, 924.
through shipments, 920.
traffic associations, 920.
liability as insurer, 921.
for failure to deliver, 915.
for delivery to wrong connecting carrier, 918.
for loss or injury, 921.
for misdelivery, 930.
for injuries to live stock, 935.
negligence need not be shown, 921.
exceptions to, 922, 923.
negligence or fraud of consignor or consignee as affecting, 922.
qualification of, exceptions to, 923.
liability as warehouseman, 924.
how created, 924.
extent of, 924.
negligence to be proven, 924.
degree of care, 924.
for misdelivery, 930.
burden of proof, 930.
general obligations, 925-938.
to receive and carry, 926.
strikes as affecting, 926.
to carry safely, 927.
to supply safe and suitable cars, 927, 928.
for live stock, 927, 935.

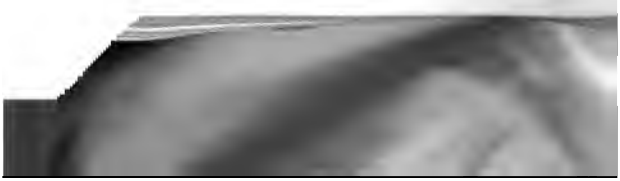
Common Carriers of Things—(*continued*).
general obligations to supply safe and suitable
for perishable goods, 927.
to supply a sufficient number of cars, 925.
to separate goods injurious to each other.
to deliver to the proper person at the desi-
place, 930.
departure from directions of bills of lading
departure from custom as to delivery,
imposition and fraud no defense, 930.
evidence of identity of consignee, 930.
rival claimants, 931.
delivery to officer of court, 931.
stoppage *in transitu*, 937, 938.
to deliver within a reasonable time, 932, 933.
perishable goods, 932.
"strikes" as affecting, 932.
contract as to time, 932.
failure in this respect not a conversion,
presumption as to reasonableness of time,
extraordinary influx of freight, 932.
contracts against liability for delay, 932.
in respect of "leaks and outs," 934.
burden of proving due care, 934.
contracts against liability for, 934.
in respect of live-stock shipments, 935, 936.
suitable cars, 935.
feeding and watering, 936.
contracts against liability, 936.
special agreements as to feeding and watering,
936.
in respect of stoppage *in transitu*, 937, 938.
compensation of, 939.
lien to secure charges, 939.
payment in advance, 940.
waiver of payment in advance, 940.
excessive charges, 941.
State regulation of, 942.
railway commissioners, 942.
discrimination between shippers, 943.
pleading in actions against, 944.
evidence in actions against, 944.

nmon Carriers of Things—(*continued*).
parties plaintiff in actions against, 945.
measure of damages in actions against, 946.
for refusal to carry, 946.
for delay, 947, 948.
special damages for delay, 948.
for loss or destruction of goods, 949.
for injury to goods, 950.
mortgage trustees operating railway, 628.
mmon Stock, definition of, 63. See SHARES OF STOCK.
ommutation Tickets. See TICKETS.
ompany. See CORPORATIONS and, RAILWAYS.
ompensation, of promoters, 14, 15.
of directors, 484.
of corporate president, 484.
of officers and agents, 484, 485.
ondemnation of Land. See EMINENT DOMAIN.
onditional Subscriptions, definition of, 94.
how far enforceable, 94.
membership dependent upon performance of condition, 94, 100.
whether commissioners may accept, 94.
not to be reckoned in determining whether statutory amount has been subscribed, 94, 108.
not necessarily conditional in form, 95.
effect of recitals, 95.
whether contrary to public policy, 96.
precedent and subsequent conditions, 97.
acceptance of, 98.
revocable until accepted, 98.
construction of, 99.
performance of conditions, 100, 101.
requisite to enforce liability of subscriber, 100.
substantial performance, 100.
evidence of, 101.
burden of proving, 101.
notice of, 101.
waiver of conditions, 102.
in express terms, 102.
by implication, 102.
legality of certain stipulations, 103.

Conditional Subscriptions—(*continued*).
illegality of stipulations inconsistent with ch. 103.
illegality of stipulations against liability upon s. 103.
effect of the words "non-assessable," 103.
requiring certain amount of capital stock to be taken, 104.
implied condition that full capital stock be taken.
where amount of capital stock is undetermined, 106.
where organization is authorized upon less than taken, 107.
where agreement is to pay "when required."
effect of adoption of new charter, 107.
estimating whether required amount has been taken, 108.
what subscriptions to be reckoned, 108.
stipulations respecting location of route, 109, 110.
subscriber's remedy upon breach of, 109.
substantial compliance sufficient, 110, 111.
whether precedent or subsequent, 111.
stipulations respecting location of depot, 110.
stipulations respecting time of completing railway, 112.
"completed," for the jury, 112.
running of trains, 112, 113.
substantial compliance sufficient, 113.
colorable fulfillment insufficient, 113.
Conditional Tickets. See TICKETS.
Conditions in Bills of Lading. See BILLS OF LADING.
Conditions Precedent and Subsequent. See CONDITIONAL SUBSCRIPTIONS and MUNICIPAL AID.
Conductors. Duty and police power of, 1004.
Conductor's Checks, given in lieu of ticket, 878.
Conflict of Laws. See INTERSTATE COMMERCE.
Congress, limited power of, to create corporations, 24.
control over commerce among the States. See INTERSTATE COMMERCE.
Connecting Carriers. See CARRIERS OF PASSENGERS, and COMMON CARRIERS OF THINGS.
Consequential Injuries, to passengers, 1009.
to property adjoining right of way, 625.

Assignee and Consignor. See COMMON CARRIERS OF THINGS.
Consolidation, "consolidation," "merger" and "amalgamation," explained, 535.
express legislative authority requisite, 536.
of competing railways, 537.
contrary to public policy, 537.
New York statute authorizing, 538.
manner of effecting under, 539.
dissenting shareholders, 540.
rights of, 540.
condemnation of shares of, under right of eminent domain, 541.
whether corporate creditors may enjoin, 543.
effect of, 543, *et seq.*
upon existence of original companies, 543, 581.
upon by-laws, rules and regulations, 544.
26 & 27 Vict. ch. 92, 544.
upon tenure of office of officers and employees, 545.
26 and 27 Vict. ch. 92, 545.
upon calls and subscriptions, 546.
upon municipal subscriptions, 214, 547.
upon pending litigation, 548.
under the New York statute, 549.
under 26 & 27 Vict. ch. 92, 549.
upon choses in action, 550.
upon contracts for purchase of land, 551.
26 & 27 Vict. ch. 92, 551.
upon rights, privileges, etc., of original companies, 553.
under the New York statute, 553.
under 26 & 27 Vict. ch. 92, 553.
upon power of eminent domain, 554.
upon appropriations, 554.
upon unsecured debts, 554.
upon exemption of officers from jury duty, 554.
upon exemption from taxation, 555.
upon public duties and obligations, 556.
upon obligations to private persons, 556.
upon continuing obligations, 557.
upon personal obligations, 557.

Consolidation—(*continued*).
effect of, upon completion of **unfinished works**, 26 & 27 Vict. ch. 92, 558.
upon rights of creditors, 560–563.
assumption of liabilities by **new** co... 560.
extent of liability of **new company**, 5...
new company not purchaser **without** ... 562.
remedies of creditors of **original** compa... 563.
upon jurisdiction of State courts, 564.
amendment of charter authorizing, 47, 48.
of companies chartered in different **States**, 55.
earnings of old company not to be **paid as** div... on stock of new, 297.
Constitutional Provisions, concerning **amend**... and repeal of charters, 41.
special charters. 32.
fictitious stock, 71.
Construction Account, what items **chargeable** ... 298.
difficulties in determining, 299.
fraud in determining, 299.
transportation of **materials** for **construction** ... road, 299.
overcharges for, 299.
interest on bonded debt, 301.
Construction of Charters and Enabling Acts. See CHARTERS.
Construction of Railroads, fences and farm crossi... 821, 969.
obstructing drainage, 822.
injuries to riparian rights, 823.
wrongful entry upon lands, 830. See EMINENT D... MAIN.
Contempt of Court. See RECEIVERS, and "STRIKES."
Contract. See CORPORATE POWERS, and ULTRA VI... ACTS.
Contributory Negligence. See INJURIES TO PASSE... GERS.
Convertible Bonds, nature of, 633.



porate Agents, may transact business in foreign State, 50.
liability of corporation for unauthorized acts of, in issuing spurious stock, 274.
authority not revoked by expiration of term of directors, 462.
removal of, 463.
appointment of, 474.
need not be under seal, 474.
need not be by formal vote, 474.
by foreign corporation, 474.
to be made a matter of record in Indiana, 474.
compensation of, 485.
degree of diligence, 486.
liability of, for fraudulent and illegal act, 491.
liability of directors for misfeasance of, 492.
criminal liability of, under New York Penal Code, 496.
de facto, 498.
must have color of authority, 498.
unauthorized acts of, 499.
definition of, 499.
distinguished from *ultra vires* and illegal acts, 499.
ratification of, 504.
acceptance of fruits of, 505.
implied and incidental powers of, 501.
certain acts held not to be within, 502.
acts apparently within scope of authority, 503.
liability of railway for injuries to passengers, 972.
Corporate Books, right of shareholders to inspect, 406
at all seasonable times, 406.
guaranteed by statute, 406.
statutory not exclusive of common-law right, 406.
motive as affecting, 406.
inconvenience to bookkeepers, 406.
by attorney, 406.
whether inclusive of right to copy, 407.
to what books applicable, 408.
remedy of shareholder, 409.
by action for damages, 409.
by *mandamus*, 409, 410.
by order of court, 409.

Corporate Books—(*continued.*)
when stranger may procure inspection, 4[illegible]
in action against shareholder, 409.
[illegible] of shareholders' meeting, 461.
in New York statute, 461.
Corporate Creditors, consent of, to relieve pro[illegible]
of liability, 6.
[illegible] of subscriptions, 116.
See [illegible] CREDITORS and BONDHOLDERS.
Corporate Elections. See DIRECTORS' MEETINGS; SHAREHOLDERS' MEETINGS.
Corporate Existence, independent of other fran[illegible]
[illegible]
derived from the sovereign, 24.
not to be created by implication, **24, 54.**
presumption of, 25.
not to be denied by *de facto* corporation, 25.
not to be collaterally attacked, 25, 26.
dissolution of, 48, 58.
extension of, by amendment to charter, 48.
not extended by implication, 58.
in a foreign State, 50.
[illegible] from more than one State, 52, 53.
a distinct corporation in each, 53.
not implied from license to foreign corporation, 5[illegible]
not from legislative recognition of foreign cor[illegible]
tion, 54.
denial of, in foreign State, 54.
as affected by consolidation, 555, 563.
by merger, 555.
by amalgamation, 555.
when companies incorporated in different States, 564.
as affected by forfeiture of charter, 584.
by repeal of charter, 595.
by ordinary dissolution, 601.
a certain implied existence after, 601.
Corporate Franchises. See CORPORATE POWERS.
Corporate Name, change of, 47, 56, 57.
essential to valid action of corporation, 56.
deviation from in contracts, 56.
not to be collaterally disputed, 56.

rate Name—(*continued.*)
operty in, 57.
not exclusive when descriptive of locality, 57.
ange of, as affecting municipal bonds and subscriptions, 214.
orate Officers, liability for overissue of stock, 280.
for false reports and prospectuses, 353.
to transferee of stock, 353.
enure of office as affected by consolidation, 554. See CORPORATE AGENTS and DIRECTORS.
porate Powers, to hold surplus lands, 26.
to be questioned only by the State, 26.
exclusive privileges strictly construed, 29.
to fix rates, strictly construed, 939.
implied and incidental powers, 30.
from authority to use a certain kind of motive power, 29.
from authority to build railway, 30.
from authority to build bridge, 30.
further examples of, 508, 509.
under the New York General Railroad Act of 1850, 35.
to subscribe to stock of other companies, 80.
to subscribe to its own stock, 80.
extension of, by amendment of charter, 47, 48.
how far to be exercised in foreign State, 50.
fostering other enterprises, 510.
limit to which it may be carried, 511.
powers not necessarily implied, 512.
examples of, 512.
infra vires acts rendered *ultra vires*, 514.
by manner of performance, 514.
by purpose of performance, 515.
by extent of performance, 516.
borrowing beyond charter limit, 516.
to be exercised by shareholders. See SHAREHOLDERS.
to be exercised by directors. See DIRECTORS.
acts exceeding powers of corporation. See ULTRA VIRES ACTS, ILLEGAL CORPORATE ACTS, and COMBINATIONS BETWEEN CORPORATIONS.
legality of pools. See POOLS.
of traffic agreements and associations. See TRAFFIC AGREEMENTS AND ASSOCIATIONS.

Corporate Powers—*(continued)*.
legality of running privileges. SEE RUNNING PRIVILEGES.
Corporations, creation of, 20.
by the States, 24.
by Congress, 24.
to carry out its delegated powers, 24.
in territory under its exclusive control, 24.
not to be implied, 24.
not to be reviewed by federal court, 24.
under the New York General Railroad Act of 1850, 34. See FOREIGN CORPORATIONS, CORPORATE EXISTENCE, CORPORATE NAME, and CORPORATE POWERS.
Corporators. See PROMOTERS, and SHAREHOLDERS.
Costs. See EMINENT DOMAIN.
Counter-claim, in actions to enforce subscriptions.
Counter. See MUNICIPAL AID.
Coupons. See BONDS.
Creditors. See UNSECURED CREDITORS, and BONDHOLDERS.
Creditors' Bill, filing of, equivalent to call, 152.
Crossings. See TORTS.
Culverts, duty of railway to maintain, 822.
Cumulative Voting, minority representation upon board of directors secured by, 450.
Current Expenses, what are, 298.
difficulties in determining, 299.
interest on bonded debt not, 301.
interest and discount on floating debt not, 301.
premium on redemption of bonds, not, 301.
Courtesy, tenant by, right to compensation for taking land, 723.
Custom, as affecting scope of directors' authority. See DIRECTORS.
Damages. See EMINENT DOMAIN, CARRIERS OF PASSENGERS, INJURIES TO PASSENGERS, COMMON CARRIERS OF THINGS, CARRIERS OF LIVE STOCK, and TORTS.
Damnum absque Injuria. See DAMAGES.
Danger, duty of railway to warn passengers of, 862. See SIGNALS OF WARNING.

erous Goods, duty of carrier to separate from others, 929.
ness, as contributory negligence, 974.
h, injuries resulting in, 1010.
nture Stock. See SHARES OF STOCK.
facto Corporations, colorable compliance with charter or enabling act, 25.
formed by merger, not to be collaterally attacked, 626.
to defeat recovery upon bonds of original company, 626.
conveyance of title to property by, 26.
ferred Stock, definition of, 63.
gree of Care. See CARRIERS OF PASSENGERS, and COMMON CARRIERS OF THINGS.
lay. See BAGGAGE, CARRIERS OF PASSENGERS, and COMMON CARRIERS OF THINGS.
legated Powers. See DIRECTORS.
livery. See COMMON CARRIERS OF THINGS.
murrage. See TERMINAL CHARGES.
posit, upon subscribing to stock. See SUBSCRIPTIONS TO STOCK.
pot, duty of railway to keep in repair, 981.
duty to light, 982.
pot Grounds. See DEPOT.
tention. See DELAY.
viation from Location. See CONDITIONAL SUBSCRIPTIONS.
visee. See TRANSFER OF STOCK.
iligence. See DEGREE OF CARE.
irectors, election of, 461.
mandamus to compel calling of meeting, 461.
manner of conducting, 461.
counting of votes, 461.
exhibition of books and papers before, 461.
failure to elect, not a dissolution of company, 574.
term of office of, 462.
expiration not revocation of authority of agents, 462.
holding over, 462.
contracts by, 462.

Directors—(*continued*).
removal of, 463.
dependent upon statutory authority, 463.
grounds of, 463.
resignation of, not a dissolution of company, 5..
number of, 456.
under New York statute, 456.
under 8 Vict. ch. 16, 456.
change in, 47.
amendment of charter authorizing, 47.
to be made by shareholders, 404.
qualifications of, 457.
at common law, 457.
under New York statute, 458.
under 8 Vict. ch. 16, 458.
election of unqualified person, 459.
disqualification after election, 460.
vacancies in, 464.
manner of supplying, 464.
meetings of, 465, *et seq.* See DIRECTORS' MEETINGS.
authority of, 404.
to compromise doubtful subscriptions, 119.
to make calls, 155.
to declare dividends, 306.
discretion herein, 306.
restrictions imposed by 8 Vict. ch. 16, 3..
to supply vacancies in own number, 464.
to manage the corporate affairs, 468.
in all ordinary matters, 468.
exclusive of interference by shareholders, 46.
enumeration of general powers, 469.
limits of their general powers, 470.
continuous course of dealing as affecting, 470.
discretion not to be questioned, 471.
discretion not to be delegated, 472.
to delegate formal execution of powers, 472.
to delegate powers to committees, 473.
under 8 Vict., 473.
to bring bill in equity to dissolve corporation, 582.
under the New York statute, 582.
no authority in, to accept amendment of charter, 46.
to increase capital stock, 46, 323.

·ectors—(*continued*).
no authority in, to cancel subscriptions, 117.
to reduce capital stock, 323.
to declare stock dividends, 286.
to reduce or increase capital stock, 46, 323, 404.
to effect any radical change, 404, 470.
to change *termini*, 404.
to mortgage, 404.
to lease, 404.
to sell charter and franchises, 404.
to dissolve corporation, 404, 579.
to make by-laws, 404.
to declare dividends in England, 404.
to do certain other acts, 470.
to delegate discretionary powers, 472.
fiduciary relation to corporation and creditors, 475.
transactions between companies having directors in common, 476.
transactions between directors and corporation, 477.
loans by directors to corporation, 478.
secret profits, 479.
company's election to avoid or enforce contracts, 480.
directors to be restored to original position, 481.
compensation of, 484.
degree of diligence required of, 486.
indemnification of, 488.
frauds of, as to current expense and construction accounts, 299.
liability herein, 300.
suit by shareholder to remedy, 411.
liability of directors, 491.
ultra vires acts of, suit by shareholder to remedy, 411.
illegal acts of, 123.
no operation to release subscribers, 123.
suit by shareholder to remedy, 411.
liability of directors, 491.
joint and several liability of, 493.
contribution between, when jointly liable, 494.
criminal liability of, under New York Penal Code, 495.

Directors—(*continued*).
gambling in securities of company, **497.**
de facto, 498.
must have color of authority, **498.**
acts of, not to be collaterally questioned.
removal by *quo warranto*, **498.**
unauthorized acts of, 499, 500.
definition of, 499.
distinction between, and *ultra vires* acts.
distinction between, and illegal acts, 499.
ratification of, 504.
acceptance of fruits of, 505.
authority to mortgage, 609.
unauthorized mortgage by, 609.
acceptance of proceeds estops shareholders
injunction to restrain, 609.
cancellation of bonds secured by, 609.
ultra vires mortgage by, 611.
remedy of creditors and shareholders, 611.
personal liability of directors herein, 611.
estopped from denying subscription to qualify shares, 78.
personal liability upon *ultra vires* mortgage, 611.
upon *ultra vires* bill of exchange, 611.
upon *ultra vires* acts in general, 517.
for permitting cancellation of subscriptions.
for issue of spurious certificates, 276.
to holder of certificates, 276.
under penal statutes, 276.
to corporate creditors, for secret profits, 475.
no liability on contracts within their powers, 4
upon contracts beyond their powers, 489.
upon contracts beyond corporate powers, 489.
upon debts beyond charter limit, 490.
upon fraudulent and illegal acts, 491.
for misfeasance of appointees, 492.
Directors' Meetings, place of, 465.
in foreign State, 51.
validity of proceedings, 51, 465.
time of, 465.
notice of, 466.
organization of, 467.

ctors' Meetings—(*continued*).
election of chairman, 467.
minutes of, 408, 467.
not open to inspection of shareholders, 408.
except in special cases, 408.
required to be kept by 8 Vict. ch. 16, 467.
presumption of regularity from entries in, 467.
failure to hold, not *per se* a dissolution, 574.
sability, subscriptions by persons under, 80.
condemnation of lands of person under, 796.
payment of dividends to persons under, 305.
scrimination. See TOLLS AND TARIFFS, UNEQUAL FACILITIES, and INTERSTATE COMMERCE.
ssolution, sundry circumstances which do not *per se* work a dissolution, 574.
failure to hold meetings, 574.
resignation of officers, 574.
failure to elect officers, 574.
treating corporation as defunct, 574.
vote of dissolution to escape liability to creditors, 574.
non-user of franchises, 575.
death of members, 575.
acquisition of whole stock by one member, 575.
loss of whole corporate property, 576.
by expiration of charter, 577.
by surrender of charter, 578.
authority and duty of directors herein, 579.
acceptance by State, 580.
by consolidation, 581.
by bill in equity, 582.
filed by creditors, 582.
filed by shareholders, 582.
filed by directors, 582.
the New York statute, 582.
by forfeiture of charter, 584, *et seq.* See FORFEITURE OF CHARTER.
by repeal of charter, 595, 596. See REPEAL OF CHARTER.
grounds for, diversion of funds from payment of dividends, 297.
insolvency, 583.

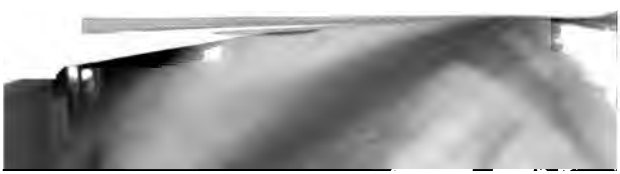
Dissolution—(*continued*).
grounds for, refusal to elect officers, 583.
sundry circumstances not sufficient as grounds dissolution, 583.
cessation of business, 583.
officers becoming non-residents, 583.
misconduct of officers, 583.
non-compliance with statute as to calling meeting, 583.
effect of, 597.
upon corporate debts, 597.
upon rights of contract, 597.
upon pending litigation, 597.
upon rights of creditors, 598.
upon rights of shareholders, 600.
distribution of assets after, 599.
qualified existence after, 601.
Dissolved Companies, qualified existence of. See CORPORATE EXISTENCE.
Distance. See INTERSTATE COMMERCE.
Diverting Highways. See STREETS AND HIGHWAYS.
Diverting Streams, damages for, 822, 823.
Dividends, right to receive, not dependent on possession of certificate, 61, 305.
upon preferred stock, 66, 287-290. See PREFERRED STOCK.
upon guaranteed stock, 66.
upon special stock, 68, 292. See SPECIAL STOCK.
upon interest-bearing stock, 69, 291. See INTEREST-BEARING STOCK.
upon common stock, 63.
upon deferred stock, 63.
upon spurious stock, 279.
injunction to restrain, 279.
cash dividends, 283.
property dividends, 283.
scrip dividends, 283.
when proper to issue, 284.
rights of holders of, 284.
stock dividends, 251, 283, 285.
when proper to issue, 285.
validity of, 285.

Dividends—(*continued*).
stock dividends, statutory prohibitions of, 285.
constitutional prohibitions of, 285.
forfeiture of charter, 285.
to be declared by shareholders, 286.
revocation before issue, 286.
right of preferred shareholders in, 286.
issue of, to corporation for sale by, 286.
privilege of shareholders to take at par, 286, 326
by foreign corporation, 286.
discrimination in payment of, 293.
between shareholders of same class, 293.
injunction to restrain, 293.
assumpsit on implied contract, 293.
damages for, 293.
company not to plead illegality of dividend, 294.
recourse against other shareholders, 294.
remedy of unregistered transferree, 294.
actions to be several, 294.
corporation itself to be made defendant, 294.
having been declared, are debts due absolutely, 295.
assignable as such, 295.
rights of shareholders in event of insolvency, 295.
fund deposited for payment of, 295.
lien of shareholders upon, 295.
failure of bank in which deposited, 295.
prospective dividends, 295.
assignment of, 295.
time of payment, 296.
place of payment, 296.
in what currency payable, 296.
from what funds payable, 297, 301.
not from capital stock, 297.
except where it has been reduced, 297.
not from payments on forfeited shares, 297.
from net profits, 297, 301.
previously accumulated, 297.
distinguished from net earnings, 301.
not from earnings of one of original of consolidated companies, 297.
from borrowed money, 297, 302.

Dividends—(*continued*).
from borrowed money, when profits have been s
for improvements, 297.
divers on of fund as cause of winding up, 29
fraudulent increase of, 299.
net earnings defined, 298.
items to be deducted from gross earnings, 29
difficulties in determining, an avenue to fraud,
distinguished from net profits, 301.
fraud in declaring, 299.
liability of corporate officers for, 300.
may be paid while company is in debt.
to whom dividends belong, 303.
as between transferrer and transferree, 303.
as between life tenant and remainder-man, 304.
to whom payable, 305.
to shareholders of record, 305.
as between holder of certificates and register
owner, 305.
as between administrator and heir, 305.
as between married woman and husband, 305.
as between pledgor and pledgee, 335.
discretion of directors as to declaring, 306.
reluctance of courts to question, 306, 308.
restrictions imposed by 8 Vict. ch. 16, 307.
proceedings to compel, 308.
injunction to restrain, 309.
at instance of shareholders, 309.
at instance of creditors, 309.
when the writ will issue, 309.
when the writ will be denied, 310.
proceedings to compel payment of dividends declared, 311.
in assumpsit, 311.
by bill in equity, 311.
mandamus will not issue, 311.
when time of payment not fixed, 311.
whether demand is prerequisite, 312.
conflicting authorities, 312.
interest recoverable, 312.
offset and counterclaim in, 313.
recovery of, when illegally paid, 314.

.vidends—*(continued)*.
recovery of, by directors, 314.
by corporate creditors, 314.
from transferree, 314.
by receiver, 314.
contribution between shareholders, 314.
statute of limitations, 314.
ocuments. See CORPORATE BOOKS.
omestic Animals, injuries to, 969.
omicile of Corporation, *prima facie* in State creating, 50.
may be acquired in foreign State, 50.
created by more than one State, 53.
exists as domestic corporation in each, 53.
presumption in favor of State of principal office, 53.
may be sued in federal court by citizens of each State, 53.
Removal of Causes Act not available by, 53.
consolidated corporations originally of different States, 55.
governs as to payment of dividends to wife or husband, 305.
)ower, interest in lands condemned, compensation for taking, 793.
)rainage, obstructing, damages for, 822.
)rovers, accompanying cattle, whether passengers, 857, 858.
whether entitled to damages for injuries, 958, 973, 995.
Dwellings, compensation for condemnation of, 814.
Earnings, interest of shareholder in, 295.
contingent until dividend declared, 295.
dividends to be declared from, 297.
except when insolvent, 297.
diversion of, from payment of dividends, 297.
net earnings, 298.
definition of, 298, 301.
what items chargeable to current expense, 298, 299.
what items chargeable to construction, 298, 299.
fraud in estimating, 299.

Earnings—(*continued*).
net, fraud in estimating, overcharge for tra
tion of materials for construction, 299.
distinguished from net profits, 301.
whether a company may have, while
302.
See SURPLUS EARNINGS, CONSTRUCTION A
CURRENT EXPENSES, PROFITS, DIVIDENDS.
Easement, of the public in streets and highways.
of abutting land-owners in streets and highwa
compensation for taking, 810.
of railway in right of way, 784.
Ejectment, of railway making wrongful entry, 83
Election of Directors. See DIRECTORS.
Embankments, flooding resulting from, 822.
Eminent Domain, power of State to take private p
erty, 775.
inherent in State as incident of sovereignty,
restriction upon, in federal constitution, 77
delegation of, to persons and corporations,
by special grant, 775.
by general laws, 775.
to railways, a ground of governmental
trol, 23.
discretion of legislature, 776.
to foreign corporations, 777.
effect of consolidation of railways, 554.
efforts to purchase condition precedent to condem
tion, 778.
acquisition of right of way by purchase, 779.
revocation of license, 780, 785.
"public use," 781.
private property to be taken only for, 781.
what constitutes, 781.
determination of legislature reviewable b
courts, 776.
"taking," 782.
what constitutes, 782.
payment before entry, 783.
title acquired by railway, 784.
whether an easement or a fee, 784.
is present and permanent, 785.



ɜnt Domain—(*continued*).
ıantity of land which may be taken, 786.
statutes regulating, 787.
ɜe of land taken, power of railway, 788.
whether exclu ive, 789.
'hat property may be taken, 793.
stock of shareholders dissenting from consolidation, 541.
various interests in realty, 793, 794.
diverse interests in same property, 795.
of persons under disability, 796.
corporate property, 797, 798.
corporate franchises, 799.
exclusive privileges, 800.
streets and highways, 802, 803.
consent of abutting land-owners, 804.
changing grade of, 805.
for street cars, 808.
for elevated railways, 809.
compensation to abutting proprietors, 810, 811.
damages for wrongful taking, 812.
compensation for property taken, owner's right to, not to be impaired by other parties having interest in same land, 795.
to corporations, 801.
common and special injuries distinguished, 806.
to proprietors of land abutting on streets and highways, 807.
to be paid by railway, not by city, 807.
when fee of street is in the public, 810.
when the public has only an easement, 811.
measure of, for lands taken, 813.
measure of, for buildings, 814.
market value as criterion of 815.
peculiar adaptability, 815, 816.
prospective use, 815, 816.
enhancement, from building of road, 817.
damages to unappropriated residue, 818.
measure of, 818.
single and disconnected properties, 819.
risk from fire, 820.

Eminent Domain—(*continued*).
damages, fences and farm crossings, 821.
obstructing drainage, 822.
flooding, 822.
riparian rights, 823.
incidental injuries, award presumed to cov
consequential injuries, 825.
speculative damages, 826.
resulting benefits, 827.
not to be considered in some States, 8
whether compensation and damages m
paid in "money," 828.
interest upon award, 829.
for wrongful entry, 830.
for trespass, 830, 831.
proceedings to condemn, 832.
under the New York statute, 833.
notice, 834.
the petition, 835.
to show corporate existence of plaintif
to show authority to condemn, 836.
ownership of defendant as shown by p
ings, 837.
description of land, 838.
evidence in, 839.
admissibility of opinions of witnesses,
admissibility of evidence as to sale
vicinity, 841.
verdict of jury or report of commissioners,
judgment and order of confirmation, 843.
appeal and removal of causes, 844.
costs, 845.
discontinuance of, 846.
before vesting of rights of parties, 847.
wrongful entry and trespass, 830, 848.
damages for, 830.
owner's remedy under statute, 848.
injunction, 849.
ejectment, 830, 850.
action in trespass, 851.
statutes of limitation, 852.
laches, 853.

›yees, injuries to. See TORTS.
ing Acts. See GENERAL INCORPORATION LAWS.
ıes, fire from, 968.
r, wrongful entry upon lands, 830, 849-851.
r condition broken, by mortgage trustees, 663.
not exclusive of other remedies, 668.
.lity of Charges. See GOVERNMENTAL CONTROL, INTERSTATE COMMERCE, and TOLLS AND TARIFFS.
.table Lien, charges superior to mortgage lien, 669-683. See RECEIVER'S CERTIFICATES.
·ow, subscriptions to stock in, 76.
ıtes in Fee, right of holder to compensation for taking, 793.
in streets, compensation for taking, 811.
dence, in actions against common carriers of goods, 944.
of non-delivery of goods, 915.
of contract of through shipment, 920.
of special contract limiting liability, 967.
burden of proof herein, 967.
of value of lands taken, 839-841.
ɛcessive Charges, of common carriers, 941.
ɛchanges. See STOCK EXCHANGES.
ɛclusive Privileges, special charges prohibited, 32.
effect of consolidation upon, 553.
exempting from taxation, effect of consolidation, 555.
condemnation of, by other railways, 800.
ɛecution, levy of, upon shares of stock, 375.
by creditors of transferrer, 375.
registration of transfer as affecting, 375, 376.
the New England rule, 375.
the New York rule, 376.
the federal rule, 376.
the English rule, 376.
ɛecutors and Administrators, payment of dividends to, 305.
transfer of stock in breach of trust, 359, 360.
liability of corporation permitting registration, 360.
right to vote at shareholders' meetings, 444, n. 3.
ɛecutory Contracts, plea of *ultra vires* as defense to, 520.

Exemplary Damages, for wrongful entry upon land, 852.
for wrongful expulsion, 887, 893.
for unnecessary violence, 888, 889.
for shame and humiliation, 891.
for expulsion without violence or insult, 892.
for refusal to carry, 946.
for failure to protect passenger, 1005.
for injuries resulting in death, 1010.
Exemption from Liability. See RESTRICTIVE LEGISLATIVES OF CARRIERS.
Expert Evidence, as to value of lands taken, 8
Expenses, of operating road. See CURRENT EX
Express Agents, whether passengers, 858.
duties to, 903.
Express Companies, discrimination between, by way, 942, 943.
Expulsion of Passengers. See CARRIERS OF SERVICES.
Extension of Line, amendment of charter as to, 47, 48.
Extension of Time, for completion of railway, 112
Extra Fare, of persons boarding trains without tickets, 877.
Extraordinary Accidents, liability of carrier for injuries resulting from, 975.
Facilities, unequal, for passengers, 855.
for shipper, 943. See INTERSTATE COMMERCE
Factor's Acts, status of shares as personalty under
Family Tickets, who may use as members of family, 875.
Fare. See TICKETS.
Farm Crossings, expense of maintaining as element of damage in taking of land, 821.
duty of railway to maintain, 969.
Felony, liability of directors, officers and agents under New York Penal Code, 495–497.
Fences, expense of maintaining as element of damage in condemnation proceedings, 821.
duty of maintaining as affecting liability for injuries to cattle, 969.
fictious Name, ordering goods to be shipped by, 93.

ious Stock, issued as fully paid, 70, 252-254.
See ISSUE OF STOCK.
gality of, 70, 72.
as between corporation and holders, 70.
onstitutional and statutory prohibitions of, 71.
oidable only, 72.
ay be impeached by State, 263.
not to be questioned by corporation, 263.
itious Subscriptions, to influence others, enforceable, 129.
uciary Relation, of promoters to corporation, 2, 3.
of directors to corporation, 475.
to corporate creditors, 475.
, risk of, as element of damage in condemnation proceedings, 820.
liability of carrier as insurer, 922, 949.
injuries to property adjoining right of way, 968.
hing Tackle, as baggage, 899, 900.
tures, subsequently acquired, subject to mortgage in general terms, 621.
what articles are, 621.
conflict of authorities, 621.
question for jury, 621.
object, effect and manner of annexation, 621.
ating, of companies, 1. See PROMOTERS.
oding Lands, as element of damage to lands not taken, 822, 823.
ods. See EXTRAORDINARY ACCIDENTS.
reclosure. See MORTGAGES.
reign Carriers, competition with, as affecting rates under Interstate Commerce Act, 1055.
reign Corporations, exist by comity alone, 50.
entitled to privileges under federal constitution, 50, 54.
may acquire domicile, 50.
by location of road, 50.
by establishment of office, 50.
by incorporation, 53.
legislative discrimination against and in favor of, 50.
license to do business, 54.
distinguished from incorporation, 54.
revocable at pleasure, 54.

Foreign Corporations—(*continued*).
license, conditioned upon having office in Sta
as recipients of municipal aid, 188.
consolidation with, 564.
effect upon jurisdiction of State courts, 5
mortgages by, 612.
to be executed according to *lex loci* r
612.
authority derived from the State creating
appointment of agents by, 474.
to be made a matter of record in Indiana
subject to State laws as affecting leased road.
Forfeiture of Charter, effect to dissolve c
tion, 584.
upon municipal bonds and subscriptions,
grounds of, issuing stock dividends, the L
constitution, 285.
wilful misuser and non-user, 584, 586, 587.
material non-compliance with incorporating
585, 586.
non-performance of conditions, 585.
unauthorized assumption of privileges, 585.
connecting with foreign road, 585.
keeping principal office out of State, 585.
insolvency, 585.
assignment for benefit of creditors, *et cetera*.
obtaining charter from another State, *et c*
586.
ultra vires and illegal acts, 588.
entering "trust" combinations, 588.
combinations among shareholders, 588, 589.
acts of shareholders, how far imputed to
poration, 589.
proceedings to be brought in name of State, 590.
scire facias, 591.
quo warranto, 591.
not to be collaterally pleaded, 592.
waiver of right to enforce, 593.
by subsequent legislative recognition, 593.
jurisdiction of courts of law, 594.
jurisdiction of courts of equity, 594.
gislature not to declare, 594.

iture of Shares, not to be effected by shareholder himself, 172, 183.
penalty for non-payment, 172.
rovisions of 8 Vict. ch. 16, respecting, 173.
of 26 & 27 Vict. ch. 118, respecting, 173.
of New York statute respecting, 173.
esolution of directors to designate shares, 173.
orfeited shares to be sold, 173.
or shareholder to be credited with highest market price, 173.
failure to exercise right of, 173.
tender before, 174.
provisions of 8 Vict. ch. 16, 174.
redemption, 174.
is a statutory remedy, 175.
not to be authorized by by-laws, 175.
statutes authorizing, to be strictly followed, 175-177.
method of effecting, 176.
irregularities in, 176.
notice of, 177.
prerequisite to validity of, 177.
not equivalent to forfeiture itself, 177.
method of giving, 177.
to be duly declared, 177.
notice of, under the New York statute, 178.
under 8 Vict. ch. 16, 178.
remedy by, not exclusive, 179.
remedy by, when cumulative, 179.
whether shareholder liable for deficiency after, 179, 180.
does not destroy their existence as a part of the capital stock, 181.
reissue after forfeiture, 181, 250.
liability of purchaser of forfeited shares, 182.
under 8 Vict. ch. 16, 182.
effect of, upon subscriber's liability to corporate creditors, 183.
power to forfeit to be exercised solely for benefit of corporation and its creditors, 183.
not to be effected by collusion, 183.
not to be made when shareholder is solvent, 183
relief against unauthorized, 184.

Forgery in transfer of stock, 365-368.
remedy of owner, 366.
liability for negligence, 367.
in note issued from, 368.
Forwarding Agents, liability of, 919.
Franchises, authority to mortgage, 608.
of being a corporation not included in grant, 615.
condemnation of, under power of eminent dom-
of corporate existence, 22.
not to be sold or assigned without legis-lative authority, 572.
of eminent domain, a ground of governmental trust, 23.
to levy tolls, a ground of governmental con-
to maintain railway not necessarily a corpora-tion, 22.
right to exercise, not to be collaterally questi-
abuse of, to be inquired into only by the Sta-
sale of, not to be effected without legislative au-thority, 572.
Fraud of consignor of goods, 922.
of consignee of goods, 922.
in issue of shares. See ISSUE OF SHARES.
in transfer of shares. See TRANSFER OF SHARES
of directors, officers and agents. See DIRECTORS
Frauds Statute of, status of shares as *goods*, etc., under, 62.
Fraudulent Representations, inducing subscription to stock. See SUBSCRIPTIONS TO STOCK.
Fraudulent Stock. See FICTITIOUS STOCK.
Free Passes. See CARRIERS OF PASSENGERS, and RESTRICTIONS UPON LIABILITIES OF CARRIERS.
Freight. See COMMON CARRIERS OF THINGS.
Freight Charges. See TOLLS AND TARIFFS.
Freight Trains, whether persons riding on are passengers, 857.
passengers presumed to know perils of riding on, 8
shot. See EXTRAORDINARY ACCIDENTS.
hting Teams, upon highways, 970.
ing of Bonds, effect to estop municipality from showing defects in original, 232.

of office, whether included under general
ge, 621, 622.
to be considered as baggage, 899, 900.
n Shares. See WAGER CONTRACTS.
FENCES.
corporation Laws, status of corporation
l under, 26.
rmality prescribed to be substantially fol-
33.
f association under, 33, 36.
al requisites of, 33.
York Railway Act of 1850, 34–38.
rporation under, 34.
ers conferred by, 35.
cles of association under, 36.
defects in, how cured, 37.
ditions precedent to incorporation, 38.
rvation of right to dissolve companies formed
nder, 595.
English Railways Construction Facilities
ct, 39.
ion of right to repeal, 596.
repeal of, 596.
n companies formed thereunder, 596.
e COMMON CARRIERS OF THINGS.
l Chattels, shares of stock are not, in En-
l, 62.
ares and Merchandise, shares of stock
2.
ntal Control, regulation of rates, 1024.
just and unreasonable charges prohibited, 1024.
the common law rule, 1024.
by the State statutes, 1024. 1027.
by Interstate Commerce Act, 1024.
by State constitutions, 1034.
asonableness, how determined, 1025.
scrimination in rates, 1026, 1030.
st of service to be considered, 1027.
stance to be considered, 1027.
rminal charges, 1031.
mpetition of other lines. 1031.
evelopment of trade, 1031.

Governmental Control—*continued.*
regulation of rates, classification of cor
porations, 1932.
how property dedicated to public use, 942.
discrimination in rates and facilities, 943.
limited time grant of special franchises, 23.
Guaranteed Stock. See PREFERRED STOCK.
Guaranty of Dividends. See PREFERRED STOCK.
Guardians authority to sell stock, 361.
purchase of stock in breach of trust, 361.
Guy, in bailment, 506, 510.
Habeas corpus to release bailee of live stock, as to
the master's liability, 522.
Heirs when entitled to dividends, 305.
High Water Mark. See RIPARIAN RIGHTS.
Highways railways declared to be, by State con
stitutions, etc. See STREETS AND HIGHWAYS.
Holder for Value. See TRANSFERRER.
Horse Railways. See STREET CARS.
Houses and buildings of, 514.
Husband and Wife. See MARRIED WOMEN.
Hypothecation of Stock. See TRANSFER OF S
Illegal Charges. See TOLLS AND TARIFFS, and
STATE CONTROL.
Illegal Corporate Acts, distinguished from acts ma
terial, 525.
as against public policy, 526.
[illegible] 527.
combinations between corporations, 529.
whether pools are illegal, 528.
ultra vires with respect to, 533.
transactions in the nature of, 534.
Implied Powers. See CORPORATE POWERS, and DIRE
TORS.
Incidental Powers. See IMPLIED POWERS.
Income. See PROFITS.
Incorporation. See GENERAL INCORPORATION LAWS.
Increased Charge, for failure to procure ticket, 87.
Increase of Capital Stock, distinction between irre
gular increase and overissue, 278.
authority to effect, dependent upon statute, 315.

...se of Capital Stock—(*continued*).
...poration beginning with less than charter amount, may increase, 315.
...junction to restrain, 315.
...t to be authorized by decree of court, 316.
in suit to enforce specific performance of contract to issue, 316.
...hen legislature may authorize, 317.
unanimous consent of shareholders, 317.
when requisite, 317.
when not requisite, 317.
...eneral statutes authorizing, 318.
New York Laws of 1850, ch. 140, 319.
26 & 27 Vict. ch. 116, 321.
27 & 28 Vict. ch. 127, 321.
30 & 31 Vict. ch. 127, 321.
strictly construed, 322.
legislative grant vests in shareholders, 323.
manner of effecting, 324.
validity of, not to be collaterally questioned, 325.
shareholders entitled to take new shares at par, 326.
remedy of shareholder deprived of privilege, 326.
...dorsement, of shares in blank. See TRANSFER OF SHARES.
...evitable Accidents, carriers of passengers not absolute insurers, 972, 975.
...fants, competency to subscribe to capital stock, 80.
to contract for purchase of, 331.
cannot compel registration, when, 331.
...formation. See QUO WARRANTO.
...fra Vires Acts. See CORPORATE POWERS, and ULTRA VIRES ACTS.
...herent Vice, injuries of goods resulting from, 922.
...junction, as to railway aid bonds, 247.
to restrain issue, 247.
to restrain payment, 247.
to restrain levy of tax to pay, 247.
operation of, upon *mandamus*, 248.
...juries by Fire, to property along the route, 968.
...juries Resulting in Death, statutory remedy of family, 1010.
...juries to Cattle, trespassing on track. See TORTS.

Injuries to Passengers, distinguished from injuries to strangers, 970.
distinguished from injuries to goods, 972.
carrier not absolute insurer of safety, 972.
negligence to be alleged, 972.
degree of care exacted of carrier, 972, 974, 975.
to be proportioned to the peril, 100.
proximate cause of, 972, 1009.
gratuitous carriage, 973.
age of person injured, 974.
sex of person injured, 974.
physical weakness of person injured, 974.
unprecedented accident, 975.
presumption of negligence from evidence, 976.
of failure to keep road in repair, 976.
of occurrence of accident, 976.
of derailment of train, 976.
of collision, 976.
of overcrowding cars, 976.
of giving way of bridge, 996.
of spreading of rails, 996.
of defective rail, 996.
of defective brake, 996.
of failure to provide appliances required by statute, 996.
rebuttal of presumption, 996.
existence of defect not to be presumed, 976.
contributory negligence of passenger, 974, 977.
degree of care exacted of passenger, 977.
effect of age, sex and sickness, 974.
no defense when carrier was grosaly negligent, 977.
to be alleged and proven by carrier, 977.
collision of vehicles of different carriers, 978.
negligence of carrier imputed to his passenger, 978.
negligence of carrier not imputed to his passenger, 978.
traveling on the Sabbath day contrary to statute, 977.
intoxication, 979.
protruding arm from window, 980.

o Passengers—(*continued*).
utory negligence of passenger standing on verge atform, 981.
edless walking on slippery stairs, 981.
alking on or crossing track at station, 981, 983.
alking in the dark, 982.
nowledge of defect in appliances for boarding and alighting, 985.
lighting in dark at unusual place, 986, 987.
lighting from front platform of street car, 986.
alighting from wrong side, 986.
boarding moving car, 987, 988, 989, 990.
alighting from moving car, 987, 988, 989.
failure to heed warnings, 987, 1000.
duty of carrier notwithstanding, 988.
in obeying instruction of carrier's servant, 985, 986, 999.
leaving seat, 992, 994.
riding on platforms and in irregular places, 993.
on invitation of servant, 993, 995.
for lack of room in car, 994.
in line of special duty, 995.
augmenting injury and retarding recovery, 1009.
ngerous premises and approaches, 981, 983.
contributory negligence, 981.
ilure to light, 982.
pproaching station at rapid speed, 983.
langerous appliances for boarding, 984, 985, 986.
langerous appliances for alighting, 984, 985, 986.
negligence herein is question for jury, 985.
contributory negligence, 985, 986.
knowledge of defect, 985.
instructions of carrier's servant, 985, 988, 989.
negligence of passenger not contributing to injury, 988.
insufficient time for boarding and alighting, 988, 989.
premature starting of train, 990.
failure to announce name of station, 990.
sudden jerking of cars, 991.
leaving seat as contributory negligence herein, 992, 994.
defective cars, machinery and road-way, 996.

Injuries to Passengers—(*continued*).
defective cars, etc., presumption of **negligence**:
evidence of, 996.
whether best of the kind must be provided,
passenger's knowledge of the defect, 997.
latent defects, 997.
misdirection of carrier's servants, 998, 999.
scope of servant's employment, 998.
passenger's knowledge of servant's line of d- 998.
imprudence of passenger in following, 999.
failure to warn, 1000.
failure of passenger to heed warning, 1000.
assaults and insults, 1001.
by fellow-passengers, 1001.
by servants of carrier, 1001.
while acting in line of duty, 1002.
by strangers, 1001, 1004.
duty of conductor to prevent, 1004.
upon female passengers, 1003.
exemplary damages, 1005.
liability of connecting carriers, 1006.
liability of sleeping-car companies, 1007.
liability of railway to passengers in sleeping-car. 1007.
liability of consolidated company, 1008.
liability of lessor and lessee companies, 1008.
measure of damages, 1009.
contributory negligence of passenger augmentin- injury, 1009.
physical condition of passenger prior to injury. 1009.
Injuries to Persons, other than passengers. See TORTS.
Injuries to Property. See EMINENT DOMAIN, RIPARIAN RIGHTS, and TORTS.
Inspection of Books. See CORPORATE BOOKS.
Insurer, liability of carrier as, 921.
exceptions to, 922.
restrictions upon. See RESTRICTIONS UPON LIABILITIES OF CARRIERS.
carrier of passengers is not, 972.
terest, upon bonds, default in payment. See BONDS.

bearing Stock, characteristics of, 69.
of holders of, 69.
s creditors, 69.
ends upon, 291.
nly out of profits, 291.
ontract to pay at all events, *ultra vires*, 291.
liability of directors for paying at all events, 291.
l Decay. See INHERENT VICE.
cted Lands, measure of damage in condemnation proceedings, 818.
cting Carriers, negligence of. See INJURIES TO PASSENGERS.
ate Commerce, freedom of, an inducement to entering the federal compact, 1011.
gulation of, granted to Congress, 1011, 1012.
or existence of, an incident of civilization, 1012.
regulation" defined, 1012.
mmerce among the States defined, 1012.
"among" interpreted, 1013.
the power granted to Congress to regulate, 1012.
purpose of, 1012.
identical with power formerly vested in the States, 1012.
means to be employed to exercise, 1012.
not confined to agencies existing at time of grant, 1012, 1014.
protects commodities from hostile State legislation, 1012.
nature and scope of, 1012.
includes transit of persons, 1013.
exchange of commodities, 1013.
exchange of messages by telegraph, 1014.
exclusive of State action, 1013, 1015.
not to interfere with private contracts, 1013.
extends to entire transit, 1013.
to transit between two points in one State through another, 1013.
to instruments and persons employed in carriage, 1013.
includes powers necessarily incident, 1014.
to authorize construction of interstate roads, 1014.

Interstate Commerce—(*continued*).
power granted to Congress includes power to p-
thefts, 1014.
includes power to provide for effect of recr-
conveyances, 1014.
to authorize bridges over navigable stre-
1014.
to require alteration of bridge, 1014.
to prescribe bridge tolls, 1014.
to close channels, 1014.
to declare a bridge a nuisance, 1015.
exclusive of State regulation, 1013, 1015.
in absence of congressional action, 1015.
in respect of importer's license, 1015.
in respect of drummer's license, 1017.
in respect of auctioneer's tax, 1015.
in respect of exclusive grants to navig-
1015.
in respect of bridges, 1015.
in respect of statements by owners of stea-
boats, 1015.
in respect of port-warden fees, 1015.
in respect of passenger tax, 1015.
in respect of transportation by water, 101-
in respect of foreign corporations, 1015.
in respect of discriminations on account
race, 1015.
in respect of fares and rates of carriers, 101-
extent of the power remaining in the States to reg-
late, 1016.
in absence of congressional action, 1016.
in respect of matters purely local, 1016.
pilotage, 1016.
public health, 1016.
harbor improvement, 1016.
wharfage fees, 1016.
liens for supplies to vessels, 1016.
marine torts, 1016.
inspection laws, 1016.
quarantine laws, 1016.
interstate rivers above tide water, 1016.
ferries, 1016.

Interstate Commerce—(*continued*).
extent of the power remaining in the State, to regulate oyster beds, 1016.
to regulate foreign insurance companies, 1016.
indirect State regulation of, by taxation, 1017.
of gross receipts of carriers, 1017, n., 1018.
of sleeping cars, 1017.
of telegraph messages, 1017.
of property of telegraph companies, 1017.
of gross receipts of telegraph companies, 1017.
of goods *in transitu*, 1017.
of passengers, 1019.
bonus distinguished from tax, 1017.
discriminating against foreign drummers, 1017.
discriminating against foreign corporations, 1017.
discriminating against foreign products, 1017, 1018, n.
not discriminating against foreign persons or products, 1018.
State regulations of, under police power, 1016, 1019.
reports of shipmasters, 1019.
quarantine, 1016, 1019.
immigration of criminals, 1019.
of paupers, 1019.
of diseased persons, 1019.
importation of diseased cattle, 1019.
of meat slaughtered without the State, 1019.
rates of carriers, 1019.
removal of telegraph poles and wires, 1019.
examination of engineers for color blindness, 1019.
safety of passengers, 1019.
articles injurious to health and morals, 1019.
prohibition of intoxicating liquors, 1019.
previous acts of Congress to regulate, 1020.
the present act of Congress to regulate, 1020.
origin of, 1020.
similarity to English acts, 1020.
importance of English decisions, 1020.
English acts liberally construed in favor of the public, 1020.
constitutionality of, 1021.
effect upon existing contracts, 1021.

Interstate Commerce—(continued).
the present act of Congress, how far the obliga-
contracts may be impaired by, 1021.
not to impair existing contracts betwee
riers, 1021.
not designed to advance interests of car
1021.
to be liberally construed, 1021.
what carriers subject to, 1022, 1023.
what traffic subject to, 1022.
continuous carriage across State line, 1
1023.
reshipment across State line, 1022, 1023.
"railroad," as defined by, 1022.
"transportation," as defined by, 1022.
"common control, management or arra
ment," 1023.
unjust and unreasonable charges prohibited, 1
determination of reasonableness, 1025, 1
cost of service to be considered, 1027.
distance to be considered, 1027.
long and short hauls, 1027.
proceedings to test reasonableness of rates, 102
unjust discrimination prohibited, 1026, 1030.
the act declaratory of the common law, 103
discrimination between express companies, 103
"similar circumstances," 1031.
meaning of the clause, 1031.
terminal charges as affecting, 1031.
competition by water, 1032, 1037.
large and small shippers, 1032, 1037.
competition of other lines, 1031, 1037.
development of trade, 1031.
agreement to patronize one carrier, 1031.
kinds of traffic, 1032.
"devices," 1032.
classification of commodities, 1032.
rebates, 1032.
discrimination on different parts of the line, 1033.
wherein injustice of discrimination consists, 1034.
in charges, 1034.
in facilities, 1034.

ommerce—(*continued*).
ıt act of Congress, the act not retroactive,

mination a question of fact, 1034.
not to be prescribed by courts, 1034.
ction to restrain discrimination, 1034.
ıl to carry, 1034.
)f service, 1035.
ılements of expense, 1035, 1036.
ıuantity of freight shipped as affecting, 1036.
ıge of passengers, 1038, 1039.
ıicket brokers, 1038.
excursion rates, 1038.
mileage rates, 1038.
commutation rates, 1038.
land explorer's tickets, 1038.
settler's tickets, 1038.
discount to purchasers of *tickets*, 1038.
joint rates, 1038.
transfer of tickets, 1039.
free passes, 1039.
equal accommodations, 1039.
suitable cars to be provided, 1040.
carrier to furnish sufficient and proper facil-
1040.
ıdamus to compel, 1040.
'ation to shipper of cattle for his services, 1040.
)ed in tank-cars, 1040.
ıreferences prohibited, 1041.
tion 3 of the Act to Regulate Commerce, 1041.
general requirements, 1041.
ıilar provision in constitution of Colorado, 1041.
ıween persons, places and commodities, 1041.
rates and in facilities, 1041.
t of transportation, 1042.
:ough and local rates, 1042, 1045.
ssification of commodities, 1042.
ecial rates to develop trade, 1042, 1045.
ference in grade on two branches of railway,
1042.
tween localities, 1043.
to force and divert business, 1043.

Interstate Commerce—(*continued*).
undue preferences prohibited between localities
turn for municipal aid, 1043.
between distributing centers, 1043.
"group rates," 1044.
through and local rates, 1045.
to obtain business, 1046.
to prevent construction of competing roa
to divert traffic from rival road, 1046.
to secure all of a shipper's freight, 1046.
in facilities, 1047, 1050, 1051.
to other carriers, 1047, 1049.
by location of station, 1048, 1051.
the corresponding English act, 1050.
in terminal charges for delivery of grain, 10
of cattle, 1047.
between delivery agents, 1047.
between omnibus proprietors, 1047.
in time of shipment, 1047.
perishable goods, 1047.
in classification of goods, 1048.
similar articles to be classified together.
combination of articles to secure lower c
fication, 1048.
between connecting carriers, 1047, 1049, 10
"according to their respective powers,"
the block signal system, 1049.
in station facilities, 1051.
location of station, 1051.
stations at intersections with other roa
1051.
abandonment of stations, 1051.
erection of new stations, 1051.
leasing of surplus land for storage, 1051.
selection of station for delivery, by shippe
1051.
in interchange of traffic, 1052, 1053.
not required by charter authority to connect,
1052.
hauling cars of other railroads, 1052.
selection of connecting carrier, 1052.
through traffic arrangements, 1052.

State Commerce Act—*(continued)*.
undue preferences prohibited in interchange of traffic, public function of railway companies, 1052.
interchange of traffic, "instrumentalities of shipment," 1052.
duty of carriers to connect, 1053.
greater charge for shorter than for longer haul forbidden, 1054.
section 4 of the Interstate Commerce Act, 1054.
no similar section in the English statutes, 1054.
same object accomplished by English "undue preference" clause, 1054.
similar sections in State statutes, 1054.
similar provisions in State constitutions, 1054.
no such rule at common law, 1054.
reductions in favor of longer distances legal under English statutes, 1054.
"in the aggregate," construed, 1054.
as embracing demurrage, 1054.
as embracing terminal charges, 1054.
"same line," construed, 1054.
violation by classification, 1054.
orders of commission suspending, in exceptional cases, 1054.
scope of the fourth section of the Interstate Commerce Act, 1055.
competition as affecting, 1055.
encouragement of industry, 1055.
probability of return loads, 1055.
difference in bulk, 1055.
difference in value, 1055.
where freights have paid local rates, 1055.
natural consequences of geographical position, 1055.
over two routes of same company, 1055.
competition in passenger rates, 1055.
what the traffic will bear, 1055.
shorter rate being fixed by commission, 1055.
"circumstances and conditions," 1056.
being similar, 1056.
circuitous route of competing line, 1056.
water competition, 1056.

Interstate Commerce Act—*(continued)*.
greater charge, etc., forbidden—"circumstances conditions"—combined water and rail compe 1056.
"circumstances and conditions"—foreign r competition, 1056.
difference in bulk, 1056.
cost of service, 1056.
uses and destination of merchandise, 10
joint or through rates, 1057.
no obligation to make, 1057.
no obligation to deliver beyond term 1057.
the shipper's remedy, 1058.
legality of rates not to be determined at inst of railway, 1058.
burden of proving dissimilarity of circumstan 1058.
pooling arrangements prohibited, 1059.
by section 5 of the Interstate Commerce Act, 1
by State statutes, 1059.
by State constitutions, 1059.
"pool" defined, 1059.
no similar section in English statutes, 1059.
by English decisions, 1059.
gist of the offense is conspiracy, 1059.
publication of rates required, 1060.
by section 6 of the Interstate Commerce Act, 10
by the English Regulation of Railways Act, 10
by State statutes, 1060.
methods of preparing rate-sheets, 1060.
to be clearly expressed, 1060.
freight carried through foreign country, 1061
schedules for foreign traffic, 1061.
method of preparing, 1061.
for export by sea, 1061.
notice of advances or reduction, 1062.
schedules to be filed, 1062.
schedules of joint tariffs, 1062.
notice of changes in joint rates, 1063.
time of giving notice, 1063.
form of tariff sheets, 1063.

erstate Commerce Act—(*continued*).
continuous carriage, 1064.
not to be interrupted to evade Interstate Commerce Act, 1064.
section 7 of the Interstate Commerce Act, 1064.
similar clause in Railway and Canal Traffic Act, 1064.
definition, 1064.
obligation of railway to haul cars of other roads, 1064.
"route" defined, 1064.
legality of contracts establishing through routes, 1064.
liability for violation of Interstate Commerce Act, 1065.
section 8 of the Interstate Commerce Act, 1065.
no action for damages lies for violation of English act, 1065.
remedy under English statute, 1065.
damages at common law, 1065.
recovery of counsel fees, 1065.
suits to enforce in United States courts, 1066.
section 9 of the Interstate Commerce Act, 1066.
incriminating testimony, 1066.
rules of evidence, 1066.
penalties for violation of Interstate Commerce Act, 1067.
section 10 of the Interstate Commerce Act, 1067.
prosecutions under, 1067
underbilling, 1067.
penalties for, by carriers, 1067.
penalties for, by shippers, 1067.
penalties for inducing unjust discrimination, 1067.
the Commission, 1068.
creation of, 1069.
section 11 of the Interstate Commerce Act, 1068.
constitutionality of, 1068.
similar State commissions, 1068.
status of, as referee of federal courts, 1068.
powers of, 1069.

Interstate Commerce Act—(*continued*).
the Commission, powers of, section 12 of the Interstate Commerce Act, 1069.
duties of, 1069.
practice before, 1069.
refusal to obey subpœnas and orders of, 1069.
complaints and investigations before, 1070.
section 13 of the Interstate Commerce Act, 1070.
proceedings before, 1070, 1073.
section 17 of the Interstate Commerce Act, 1073.
findings of, as evidence, 1071.
salaries of, 1073.
secretary, 1073.
expenses, 1073.
witness fees, 1073.
section 18 of the Interstate Commerce Act, 1073.
principal office and sessions of, 1073.
section 19 of the Interstate Commerce Act, 1073.
constitutionality of legislation as to effect of evidence, 1071.
to report annually to Congress, 1073.
section 21 of the Interstate Commerce Act, 1074.
notice to carriers to desist from violations, 1070.
section 15 of the Interstate Commerce Act, 1071.
jurisdiction of United States courts, 1072.
section 16 of the Interstate Commerce Act, 1072.
appeals, 1072.
annual reports to be made by carriers, 1074.
section 20 of the Interstate Commerce Act, 1074.
form and requisites of reports, 1074.
reduced rates and free passes, 1075.
section 22 of the Interstate Commerce Act, 1075.
mileage, excursion or commutation tickets, 1075.
discrimination between classes of passengers, 1075.
exception as to officers and employees, 1075.

rstate Commerce Act—(*continued*).
nandamus to compel movement of traffic, 1076.
new section of the Interstate Commerce Act, 1076.
>xication, as contributory negligence, 979.
itation, to ride in irregular places, 993, 995.
as affecting liability of carrier for injuries, 993, 995.
ue of Shares, after forfeiture or cancellation, 181.
the several methods of issue, 250.
re-issue of forfeited shares, 250.
stock dividends, 251.
when legal, 251.
when fictitious and fraudulent, 251.
payment in money, 252.
for less than par value, 252.
the American rule, 252, 266.
the stock a trust fund for corporate creditors, 252.
when legal, 253.
the English rule, 254, 267.
payment by check or note, 255.
prohibition of, by statute, 255.
for property or services, 256.
English rule as to registration, 257.
distinction between, and sale of stock, 258.
what property may be received by company, 259.
taken at an overvaluation, 260.
whether fraud must be proven, 261.
fraudulent intent as a question of fact or law, 262.
fictitious issue for less than par, 252, 253, 263.
validity may be impeached by State, 263.
validity not to be questioned by company, 263.
not to be set aside or enforced at suit of participating shareholder, 264.
remedy of dissenting shareholder, 265.
remedy of corporate creditors, 266.
the American doctrine, 252, 266.
the New York statute, 266.
the English rule, 254, 267.
remedy of transferree, 268.
burden of showing false representations, 268.
when transferree affected with notice, 269.

Issue of Shares—(*continued*).
fictitious issue for less than par, when transferee bound to suspect fraud, 269.
liability of transferree, 270.
when shares were issued as "fully [illegible] 270.
effect of words "non-assessable," 270.
liability of corporate officers for, 271.
specific performance of contract to issue not enforceable when, 316. See OVERISSUED S[illegible]
Jarring, and jerking of trains. See INJURIES TO [illegible] SENGERS.
Jewelry, as baggage, 899, 900.
Joint Lines. See CONNECTING CARRIERS, and TRA[illegible] AGREEMENTS AND ASSOCIATIONS.
Joint Owners, apportionment of compensation lands between, 793-795.
Joint Traffic Arrangements. See TRAFFIC AGR[illegible] MENTS AND ASSOCIATIONS, and CONNECTING [illegible] RIERS.
Judgment Creditors. See UNSECURED CREDITORS.
Jury Duty, exemption of corporate officers from, 5[illegible] effect of consolidation, 554.
Jury to Assess Compensation. See EMINENT D[illegible] MAIN.
Laborers. See SERVANTS.
Laborers' Wages, personal liability of shareholde[illegible] for, 424.
Land-Owners, the various interests which constitu[illegible] ownership, 793, 794.
right to compensation not to be impaired by other having interest in same lands, 795.
Lands, condemnation of. See EMINENT DOMAIN.
Lands (Surplus or Additional). See SURPLUS LANDS.
Latent Defects, liability of carriers, 996.
Law of Place. See DOMICILE.
Leaseholds, owners of, entitled to compensation for taking of lands, 793, 794.
Lease of Railways, authority to, not inclusive of power to subscribe to stock, 81.
authority to consolidate not inclusive of power to lease, 565.

se of Railways—(*continued*).
statutes authorizing to be strictly followed, 565.
terms of, not to be modified by directors, 565.
without authority, 565.
injunction to restrain, 565.
statutory authority requisite to validity of, 566.
lessees of railways authorized to acquire stock of lessor, 567.
under the New York statute, 567.
effect of, 568.
upon enjoyment of powers and privileges, 568.
upon restrictions upon charges, 568.
upon foreign lessees, 568.
upon liability for torts, 569.
when authorized, 570.
recovery of rent upon *ultra vires* lease, 571.
Legatee of Shares. See EXECUTORS AND ADMINISTRATORS.
Legislative Control, of railways. See GOVERNMENTAL CONTROL, and INTERSTATE COMMERCE.
Lessees of Lands, entitled to compensation for taking of lands, 793, 794.
Lessees of Railways. See LEASE OF RAILWAYS.
Lessor. See LEASE OF RAILWAYS.
Lex Loci. See DOMICILE.
License, to foreign corporation, distinguished from incorporation, 54.
to construct and operate railway over lands, 780.
revocation of, 780.
Lien. See EQUITABLE LIEN, and MORTGAGES.
Life Estates and Remainders, in shares of stock, 304.
to whom dividends belong, 304.
Lightning. See ACT OF GOD.
Lights, duty of railway to supply at stations, 982.
Limitations (Statutes of), special contracts by carriers prescribing shorter time, 966.
Lis Pendens, not applicable to bonds negotiated before maturity, 230.
Live Stock Shipments. See CARRIERS OF LIVE STOCK.
Lloyd's Bonds, to secure current obligations, 605.
Lobbying, illegal as against public policy, 527.

Location, change of, as affecting subscriptions to 109, 110, 111.
as affecting municipal subscriptions, 219.
as affecting lands condemned, 791, 792.
in discretion of company, 790.
Locomotives, sparks from, 968.
defective spark arrester, 968.
whether persons riding on are passengers, 85. 995.
Lord's Day, traveling upon, as contributory neg 977.
Loss of Goods. See COMMON CARRIERS OF THIN
Loss of Ticket, failure to show ticket when dema 876.
Loss of Time. See DELAY.
Lost or Stolen Certificates. See CERTIFICATE STOCK.
Lost or Stolen Bonds. See BONDS.
Luggage. See BAGGAGE.
Machinery, defective, causing injuries to passeng 996.
causing injuries to servants, 971.
Majority. See SHAREHOLDERS, and BONDHOLDERS.
Malicious Assaults and Insults, upon passengers carriers' servants, 1002.
Mandamus, to municipal officers respecting railway bonds, 240, 241.
operation of, upon injunction, 248.
Maps and Profiles, deposit of, with board of trade, 3 under 27 & 28 Vict. ch. 121, 39.
Married Women, competency to subscribe to stock, 9 dividends, when payable to, 305.
competency to contract for transfer of stock, 331.
Master and Servant, injuries to servants, 971.
injuries by servants to passengers, 1002.
scope of servant's employment, 1002.
Materials, charges for, superior to mortgage lien, 669.
Mechanics' Liens, as superior to mortgage lien, 676.
Meetings. See DIRECTORS' MEETINGS, and SHAREHOLDERS' MEETINGS.
'andise. See GOODS.
. See CONSOLIDATION.

...age Tickets, or commutation tickets, 875.
. Site, peculiar adaptability of lands for, 815.
..es, prospective use of lands for, 815.
..utes, of directors' meetings, whether open to inspection, 408.
presumption of *omnia rite acta*, from entries in, 455, 467.
scarriage. See COMMON CARRIERS OF THINGS.
sdelivery. See COMMON CARRIERS OF THINGS.
..srepresentations. See SUBSCRIPTIONS TO STOCK.
istake, as a ground for cancellation of subscriptions, 118.
..isuser. See FORFEITURE OF CHARTERS.
Mortgagees, title of, 624.
to property subject to pre-existing incumbrances, 624.
vendor's lien, 624.
condition unperformed, 624.
lien of mortgagees of vendor, 624.
Mortgage of Stock. See TRANSFER OF STOCK.
Mortgages, power of corporations in general to borrow and to mortgage, 602.
power of railway companies to borrow and to mortgage, 603.
dependent upon legislative authority, 603.
of calls, 158, 603, 604, 619.
of surplus lands, 603, 617, 620.
of rolling-stock, 603.
of property not acquired under power of eminent domain, 603.
of property not requisite for public functions, 603.
to secure pre-existing debt, 603, 604.
to secure money for constructing road, 603, 604.
statutes authorizing, 604.
of the "undertaking," 604, 616.
statutory restrictions, 605.
exceptions in favor of current obligations, 605.
Lloyd's bonds, 605.
not applicable to foreign corporations, 612.
extent of statutory authority, 606.
statutory authority strictly construed, 606.
authority to guaranty bonds of other corporations, 607.

Mortgages—(*continued*).
of property, implied authority, 608.
of franchises, authority not to be lightly presumed, 608.
to be made by directors, 609.
unless reserved to shareholders, 609.
to be made by shareholders, when, 609.
by directors without authority, 609.
estoppel of shareholders receiving proceeds, 609.
injunction to restrain, 609.
cancellation of bonds secured by, 609.
ultra vires, 603, 610.
remedial legislation, 610.
legislative recognition of, 610.
injunction to restrain, 611.
manner of executing, 612.
to be executed by directors, 612.
or agent appointed by them, 612.
to be under seal, 612.
to describe the bonds secured thereby, 612.
to state the consideration, 612.
to conform to *lex loci rei sitæ*, 612.
defective and informal mortgages, 613.
may be reformed in equity, 613.
enforcement of trust deeds as, 613.
of bonds as, 613.
enforcement of contract for purchase of rolling-stock as, 613.
unnecessary with respect to bonds secured by statutory lien, 614.
to be recorded, 615.
effect of, when not recorded, 615.
covering road and rolling-stock not to be recorded as chattel mortgage, 615.
in general terms, 616, 617.
"all other property," 616, 617, 619.
"the undertaking," 616, 617.
"appurtenances," 616, 617, 620.
"franchises," 616.
the going concern, 617.
future acquisitions, 618, 619, 620.

tgages—(*continued*).
n general terms, choses in action, 619.
calls, 158, 619.
unpaid subscriptions, 619.
express words of futurity, 620.
fixtures, 621.
subsequently acquired, subject to general mortgage, 621.
what articles are, 621, 622.
rolling-stock, 622, 624.
earnings, 623.
not within terms of general mortgage, 623.
express words requisite, 623.
only net earnings to be mortgaged, 623.
purchasers of mortgaged property, 624.
title as against mortgagees, 624.
change of route, 625.
abandoned route relieved from lien, 625.
lien attaches to new route, 625.
consolidation, 554, 626.
no impairment of lien, 561, 562, 626.
assumption of liabilities of old companies, 626.
by consolidated company, superior to unsecured debts of old companies, 554.
reclosure sale terminates interests of shareholders, 574.
ecitals in mortgage deeds, 634.
foreclosure of, 655.
interest of public in "going concern," 656.
jurisdiction over, 658.
as between State and federal courts, 658.
as between courts of several States, 659.
parties to, 660, 661.
for interest before maturity of principal, 662.
decree of sale, 686.
provision for purchase by bondholders, 686.
conclusive upon all having notice, 687.
vacation of, 692, 693.
sale, 688.
purchaser's title, 689.
termination of shareholders' interest, 574.
distribution of proceeds, 690, 691.

Mortgages—(*continued*).
entry for condition broken, 663.
"six months clauses," 663.
default in payment of interest, 663.
principal to become due upon non-payme
interest, 663, 664.
entry under, not exclusive of other remedie
charges superior to lien of, 669.
current expenses, 669.
current claims, 670, 671.
debts incurred by receiver, 672 673.
a charge upon body of property itself, 6
statutory liens, 675.
in favor of laborers, 676.
equitable liens, 675.
debts due the State, 677.
purchase price of lands, 678.
debts for completing unfinished line, 679.
rentals of leased lines, 680.
lien of vendors of rolling-stock, 680.
car-trust leases, 680.
as to liens of judgment creditors, 681.
claims for damages, breach of contract, *et*
682.
first charges upon income and prior liens on co
distinguished, 683.
claims disallowed priority, 684.
advancements to pay preferred claims, 685.
redemption, 694.
Mortgage Trustees, whether a foreign company
act, 627.
judgment against, conclusive upon bondholders, 6
enforcement of lien by, 627.
neglect to act, 627.
not to divest themselves of title, 627.
competency of, not impaired by holding bonds, 6
duties of, 628.
liabilities of, 628.
when in possession of railway, 628.
for breach of trust, 628.
remuneration of, 628.
vacancies among, 629.

;gage Trustees—(*continued*).
acancies among, how supplied, 629.
who may be elected, 629.
when foreclosure suit is suspended by, 629.
foreclosure suit not abated by, 629.
discharge of, 630.
removal of, 630.
grounds for, 630.
duty to enter or foreclose upon request of bondholders, 665.
right of bondholder to sue upon refusal, 667.
rights and duties after entry, 666.
rtmain (Statutes of), status of shares as personalty under, 62.
)tive Power, use of steam in cities, 29.
unicipal Aid, authority of municipalities to aid railways, solely statutory, 185.
may be by subscription or by donation, 185.
constitutional power of the legislature to authorize, 186, 187.
conflicting decisions, 187.
to foreign railways, 188.
to railways not located within the county, 188.
whether the legislature may compel, 189.
express legislative authority to be shown, 190.
authority granted railway to receive not authority to city to give, 190.
authority to borrow and issue bonds, 191.
whether implied from authority to aid, 191.
enabling act to be strictly followed, 192.
except as to mere matters of form, 192.
ratification of illegally issued bonds, 194.
remedial legislation, 194.
constitutiona ity of, 194, 195.
prospective effect of general enabling acts, 196.
as to railways subsequently chartered, 196.
as to municipalities subsequently erected, 196.
vote prior to incorporation of municipality, a nullity, 196.
repeal of enabling acts, 197, 200.
effect of, upon validity of vote to aid, 197.
constitutional inhibitions of, 198.

[illegible]
[illegible] 195.
[illegible] 196
[illegible]
[illegible]
[illegible]

ɔipal Aid—(*continued*).
ıalifications of electors, "inhabitants," 208.
"tax-payers," 208.
"people," 208.
partners, trustees, etc., as "tax-payers," 209.
vithdrawal of vote, 210.
'majority" of electors, 211.
what constitutes, 211.
bribery and fraud to influence election, 212
change in status of municipality, 213.
division of municipality, 213.
repeal of charter, 213.
grant of new charter, 213.
consolidation of municipalities, 213.
change in status of railway, 214, 215.
division of railway, 214.
consolidation of railways, 214, 547.
change in name, 214.
transfer of property and franchises, 215.
effect of, 215.
liability of transferree, 216.
forfeiture of charter of railway, 217.
conditions annexed to, 216.
liability of transferree of railway, 216.
liability of purchasers at foreclosure sale, 216.
assignment of interest in tax by the railway, 217.
at suit of judgment creditor, 217.
form of contract of subscription, 218.
need not be in writing, 218.
limitation upon when not in writing, 218.
acceptance of subscription, 219.
whether the popular vote constitutes a subscription, 218.
whether the order of court constitutes a subscription, 218.
subscriptions upon conditions, 219.
express, 219.
implied, 219.
the same as attached to other subscriptions, 219.
performance, 220.
waiver, 220.

Municipal Aid—(*continued*).
subscriptions upon conditions, effect of non-performance upon validity of bonds, 221. See MUNICIPAL BONDS.
what officers may make subscription, 222.
delegation of authority, 222.
commissioners appointed to make, 223.
scope of authority, 223.
terms of subscription as voted not to be varied, 223.
absolute subscription, the authority being conditional, 223.
payment of subscription, 224.
whether in bonds or money, 224.
exchange of bonds for stock of railway, 224.
railway cannot require, 224.
time of, 225.
limitation upon, 225.
taxation for, 226.
railway entitled to whole proceeds of levy, 226.
"as long as necessary," 226.
of railway property, 227.
recovery of tax, the bonds being void, 227.
not to be enjoined for formal defects, 231.
right of railway to enforce payment of, 240.
non-performance of condition as affecting, 240.
suspension of construction as affecting, 240.
release of municipality from subscription, 243, 24
injunction to restrain railway from breach of condition, 243.
rights and remedies of municipality not superior to other subscribers, 244.
enforcement of delivery of stock, 245.
distribution of stock among tax-payers, 245.
construction of enabling acts, 249.
when federal courts will follow State courts, 249
Municipal Bonds, authorized for one purpose and issued for another, void, 190.
authority to issue, 191.
whether implied from authority to aid railway, 191.
illegally issued, 194.
votes of ratification, 194.

nicipal Bonds—(*continued*).
illegally issued, remedial legislation, 194.
constitutionality of, 194, 195.
in excess of limit of municipal power o borrow, 200.
valid, in hands of *bona-fide* holder, 200.
valid though enabling act be repealed, 201.
effect of withdrawal of vote, 210.
change in status of municipality as affecting, 213.
change in status of railway as affecting, 214. See MUNICIPAL AID.
forfeiture of charter of railway as affecting, 217.
non-performance of conditions upon which issued, 221.
renders bonds void in hands of railway, 221.
whether void in hands of *bona-fide* purchaser, 221.
distinction between conditions precedent and subsequent, 221.
remedy of purchaser against railway, 221.
by what officers to be issued, 222.
signature of officers *de facto*, 222.
delegation of authority, 222.
signature after resignation, 222.
signature on the Sabbath, 222.
denomination of, 223.
to be determined by officers issuing, 223.
exchange of, for stock of railway, 224.
the New York rule, 224.
railway cannot require, 224.
time of payment, 225.
not to run longer than time prescribed in enabling act, 225.
falling due on default in payment of interest, 225.
place of payment, 225.
named in bonds not to be varied, 225.
recovery of tax, the bonds being void, 227.
issue below par, 228.
injunction to restrain collection in full, 228.
rights of transferee.
negotiability of, 229.
and of coupons, 229.

Municipal Bonds—(*continued*).
status of purchasers and holders, **230.**
knowledge of conditions, 230.
burden of proving good faith, **230.**
suspicion of defect, 230.
lis pendens, 230.
estoppel of municipality, 231, 232.
to deny regularity of issue, 231.
to deny performance of conditions, **231.**
by levying tax, 232.
by voting as stockholder, 232.
by continued recognition, 232.
by funding, 232.
by recitals in the bonds, 233–237.
by certificate of municipal officers, **234–237.**
upon bonds, 234.
upon municipal records, 234, 235.
direct and collateral attack, 235.
holders affected with knowledge of enabling act, 2[illegible]
237.
as to fact of compliance therewith, 236.
as to entire want of authority to issue, 237.
coupons of, 238.
signature of, 238.
interest upon, 238.
transferable by delivery, 238.
invalidity of bonds of, affecting *bona-fide* hol[illegible]
of coupons, 238.
demand and protest, 238.
limitation upon, 238.
substitution and re-issue of, 239.
mandamus to compel issue of, 240.
knowledge of want of authority to issue, 240.
mandamus to compel delivery of, 241.
rights and remedies of holders, 241.
mandamus, 241.
to compel levy of tax to pay, 241.
to treasurer of municipality to pay, 241.
to compel payment of interest, 241.
denial of writ conclusive as to invalidity of bonds, 241.
will not issue to compel unauthorized act, 241.

Municipal Bonds—(*continued*).
rights and remedies of holders, when bonds are void, 242.
action for money had and received, 242.
action against railway, 242.
subrogation to rights of municipality against railway, 242.
rights and remedies of municipality, 243–246.
against railway, 243.
with respect to void bonds, 246.
all bondholders should be parties, 246.
injunction to restrain treasurer from paying, 246.
remedies of tax-payers, 247.
to restrain unauthorized issue, 247.
to restrain payment of illegally issued, 247.
to restrain levy of tax, the bonds being illegal, 247.
to restrain payment of bonds issued on conditions unfulfilled, 247.
conflict of remedies, 248.
mandamus and injunction, 248.
construction of enabling acts, 249.
when federal courts will follow State courts, 249.
See MUNICIPAL AID.
authority of railway to guaranty, 607.
Municipal Corporations, powers of, respecting railway aid. See MUNICIPAL AID.
Names of Corporations. See CORPORATE NAME.
Navigable Streams, authority to bridge, 1014.
Negligence. See CARRIERS OF PASSENGERS, COMMON CARRIERS OF THINGS, and RESTRICTIONS UPON LIABILITIES OF CARRIERS.
of consignor of goods, 919.
of consignee of goods, 919.
of railway as warehouseman, 921.
Negotiable Paper. See BONDS, MUNICIPAL BONDS, and SHARES OF STOCK.
Net Earnings. See EARNINGS.
New Certificates. See CERTIFICATES OF STOCK.
New Shares. See INCREASE OF CAPITAL STOCK.
Noise, of trains, as element of damage to lands not taken, 818.

Non-Assessable Stock, subject to calls, 146.
SESSMENTS.
Non-user. See FORFEITURE OF CHARTERS, &c.
OF WAY.
Nuisances, elevated railways as, 812.
Nul Tiel Corporation. See CORPORATE EXIST
Oaths, required of shareholders voting, 452.
required of persons presenting proxies to vo
452.
Obligation of Contracts. See VESTED RIGHTS.
Obstruction, of light, by elevated railways, 810.
of ingress and egress as element of damages t
not taken, 818.
of drainage, as element of damage, 822.
Office, keeping principal office out of the State, 58
Officers. See CORPORATE OFFICERS, CORPORATE A
and DIRECTORS.
Operating Expenses, as a lien superior to mo
lien, 656, 672-674. See RECEIVERS' CERTIFI
Opinions, of witnesses, in condemnation proceedings.
Opposition to bill, quieting, 19.
Oral Agreements. See SUBSCRIPTIONS TO STOCK.
Order and Disposition, clause of English Bankru
Act, 62.
shares as "things in action" under, 62.
Ordinary Care. See DEGREE OF CARE.
Organization (Defective), cure of, 37.
operation to release subscriber, 122.
liability of shareholders, 25, 26, 122.
Overcharges. See TOLLS AND TARIFFS.
Overissued Stock, definition of, 63.
invalid in hands of *bona-fide* purchaser, 272.
may be declared void and canceled, 272.
no estoppel to deny validity of, 272.
liability of company in damages for overissue, 273.
damages *ex delicto*, 273.
by agent acting without authority from direct-
ors, 274.
estoppel of corporation to deny authority,
274, 275.
liability of corporate officers, 276.
to holder of spurious certificate, 276.

[illegible] Issued Stock—(*continued*).
.bility of corporate officers under penal statutes, 276.
.-older of, not liable to corporation or creditors, 277.
no estoppel against, 277.
.-istinction between, and irregular increase, 278.
.emedy of stockholders and corporation, 279.
acquiescence as bar to the remedy, 279.
.emedy of holders of, 280.
against corporation, 280.
against corporate officers, 280.
burden of proof, 280.
condition precedent to, 280.
offset against assessments upon valid stock, 280.
against transferrer, 280.
measure of damages, 281.
remedial statutes, 282.
Ownership of Land, the various interests which constitute, 793, 794.
between high and low tide and water-marks, 823.
Parlor Cars. See SLEEPING-CAR COMPANIES.
Parol Contracts. See SUBSCRIPTIONS TO SHARES, and CONDITIONAL SUBSCRIPTIONS.
Partners, whether promoters liable as, 8, 9.
Passes, whether persons riding free are passengers, 958.
stipulations in, restricting carrier's liability, 958.
Passengers. See CARRIERS OF PASSENGERS.
Patent Defects, liability of carriers for, 996.
passenger's knowledge of, 997.
servant's knowledge of, 971.
Paupers, competency of, to receive transfer of shares, 331.
Plans. See MAPS AND PROFILES.
Platform. See CARRIERS OF PASSENGERS, and INJURIES TO PASSENGERS.
Pleading, in actions against common carriers of goods, 941.
in actions under special contracts limiting carrier's liability, 968.
Pledge of Stock. See TRANSFER OF STOCK.
Police Power of State, over railways as quasi-public corporations, 22. See GOVERNMENTAL CONTROL.

Police Power of Railways, to protect passe... 1001, 1004.
"Pools," whether illegal as against **public policy**, ...
validity of, in England, 528.
validity of, in America, 528.
when formed to prevent **ruinous competitio...**
invalidity of, as to roads to be **constructed**, 528.
when amounting to **amalgamation**, 528.
Power of Attorney, to register **transfer of shares** not revoked by death, 345.
to be signed by last registered **shareholder**.
Powers Corporate. See CORPORATE POWERS, and U... VIRES.
Precautions against Accident, duty of **railw...** take, 975, 976.
Preference, between passengers and **shippers.** See ... CRIMINATION.
Preference Shares. See PREFERRED STOCK.
Preferred Stock, defined, 63, 64.
the power to issue, 65.
status of holders of, 67.
not creditors, 67, 287.
right to participate in stock **dividends**, 286.
dividends upon, 66, 287.
to be declared only from earnings, 287.
to have preference over common stock, 287.
injunction to restrain dividends upon comm... stock, 287.
to have preference over floating creditors, 287.
to have preference over sinking fund, 287.
no discretion in directors as to declaring, 288.
bill in equity to enforce, 288, 289.
arrears of, 289.
enforcement of payment, 289.
interest thereon, 289.
provisions of 26 and 27 Vict. ch. 118, 289.
assignment of, 295.
not entitled to priority in distribution of **proceeds** of sale, 572.
Presidents of Corporations, election of, 482.
under New York statute, 482.
powers of, 482, 483.

dents of Corporations—(*continued*).
owers of, when owning nearly whole capital stock, 482.
enlargement of, by custom, 483.
implied, 483.
to sue and defend, 483.
to employ counsel, 483.
may act as secretary, 483.
succeeded by vice-president, 483.
compensation of, 484.
ncipal and Agent, whether promoters stand in relation of, 10.
whether provisional and acting committee-men stand in relation of, 11.
whether agency may be shown by prospectus, 12.
ivate Corporations, how far railways are, 23.
rofits, net, distinguished from net earnings, 301.
surplus proceeds of sale after payment of debts, not "profits," 572.
romoters, definition, 1.
evidence of acting as, 1.
fiduciary relation to corporation, 2, 3, 4.
accountability for secret profits, 2.
accountability for gifts and commissions, 3.
sales by, to corporation, 4.
personal liability of, upon contracts, 5.
in behalf of the corporation, 5.
conditioned upon formation of corporation, 5.
stipulating against joint liability, 5.
of provisional committee, 5.
to indemnify provisional committee, 5.
consent of creditors requisite to relieve from, 6.
ratification by corporation insufficient, 6.
charter making company liable insufficient, 6.
agreement to look to company alone, 6.
admission of liability, 7.
made in ignorance of law, 7.
made in ignorance of fact, 7.
liability as partners, 8, 9.
not ordinarily incurred, 8.
may be incurred, 9.
by holding themselves out as partners, 9.
by negligent or fraudulent silence, 9.

Promoters—(*continued*).
liability as partners may be incurred, *ex delicto*, 9.
by participating in a meeting, 9.
relation of principal and agent between, 10.
no presumption of, 10.
question of fact, 10, 11.
provisional and acting committees, 11, 12.
prospectus as evidence of, 12, 13.
liability to subscribers, 13.
upon the failure of the scheme, 13.
indemnification of, 14, 15.
by the company, 14.
by each other, 15.
compensation of, 14, 15.
by the company, 14.
by each other, 15.
contribution between, 15.
restitution of unexpended deposits to subscribers, 16.
liability of corporation for acts of, 17.
express ratification, 17.
implied ratification, 17.
by acceptance of benefits, 17.
by acceptance of charter imposing liability, 17.
under the English statute, 17.
ratification considered as a new contract, 17.
enforcement of contracts of, by corporation, 18.
contracts by, to quiet opposition to charter, 19.
how far legal and enforceable, 20.
petitions in equity to quiet opposition to charter, 21.
liability of, for fraudulent misrepresentations to subscribers, 130.
suits by, against co-promoters, 5.
ratification of acts by corporation, 6.
effect of, the creditors dissenting, 6.
charter provision making company liable, 6.
effect of, the creditors dissenting, 6.
Property, condemnation of. See EMINENT DOMAIN.
Prospectus, recitals in, 95.
effect, to render subscription conditional, 95.
misrepresentations in, 133.
effect to render subscription voidable, 133.
inducing purchase of shares, 353.

visional Committee. See PROMOTERS.
visional Contracts. See PROMOTERS.
xies, right to vote by, dependent upon statute or by-law, 447.
form of, under 8 Vict. ch. 16, 447.
by lunatics, 447.
by infants, 447.
oath of person offering to vote by, 447.
under New York statute, 447.
to trustees, to control corporation, 451.
blic (The), rights of, in streets and highways, 810.
as affecting compensation to abutting land-owners, 810.
as affecting liability for injuries, 970.
ublic Corporations, how far railways are, 23.
ublic Enemy, meaning and extent of the term, 922.
injuries to goods resulting from act of, 922.
ublic Policy, examples of corporate acts contrary to, 526.
lobbying, 527.
pools, 528.
trusts, 529.
whether opposed to conditional subscriptions, 96.
ublic Use, taking of property for. See EMINENT DOMAIN.
governmental control of property dedicated to, 942.
unitive Damages. See EXEMPLARY DAMAGES.
urchase-money, lien of vendors of rolling stock, 622.
lien of vendors of land, 678.
urchase of Right of Way. See RIGHT OF WAY.
urpresture, in wrongful taking of streets, 812.
uorum, what constitutes, 449.
uo Warranto, to question *de jure* corporate existence, 26, 591.
to question *ultra vires* acts, 534.
not to be instituted when, 534.
to oust corporation for illegal acts, 534.
Railway Commissions, constitutionality of, 939.
Railway Companies, as public corporations, 23.
public duties, 23.
as private corporations, 23.
vested rights, 23.

Railway Companies—(*continued*).
as private corporations, State and federal ownership of shares in, 23.
existence of, derived from the sovereign, 24.
creation of by the States, 24.
creation of by Congress, 24.
in territory under its exclusive control, 24.
general incorporation acts for formation of, 33 ff. See GENERAL INCORPORATION LAWS.
not to subscribe to stock of other railways, 81.
not to subscribe to their own stock, 81.
franchise of maintaining, 22.
not necessarily a corporate franchise, 22.
not in its nature unassignable, 22.
as highways, 22.
as private carriers, 910.
as common carriers, 22, 23, 910. See COMMON CARRIERS.
as warehousemen, 911, 921.
prior to commencement of transit, 911.
after termination of transit, 921.
as public corporations, 23.
public duties, 23.
as private corporations, 23.
vested rights, 23.
State and federal ownership of shares in, 23.
change of *termini*, amendment of charter authorizing, 47, 48.
"Railways Construction Facilities Act," provisions of, respecting incorporation of companies, 39.
Rates, State legislation fixing, 939.
discrimination in, 940. See TOLLS AND TARIFFS.
Ratification. See PROMOTERS.
Real Estate, shares in companies owning, 62.
whether realty or personalty, 62. See LANDS.
Reasonable Care. See DEGREE OF CARE.
Reasonable Preference. See INTERSTATE COMMERCE.
Reasonable Time. See CONDITIONAL SUBSCRIPTIONS.
Rebates, legality of contract to pay, to shipper, 1030, 1032.
Receivers, defined, 695.
originally mere custodians, 695.

eceivers—(*continued*).
enlarged powers of, 695.
under State statutes, 695.
in appointing, merits of case not to be considered, 695.
appointment of, no effect upon statutes of limitation, 695.
his possession is possession of court, 695.
plaintiff not liable for acts of receiver, 695.
proceedings by, to recover dividends illegally paid, 314.
appointment of, upon refusal to elect officers, 574.
priority of debts incurred by, 672, 673.
as charge upon income, 673.
as charge upon *corpus*, 674.
appointment of, 696, *et seq.*
upon application of unsecured creditors, 696.
upon application of junior mortgagees, 697.
upon application of company, 698.
to manage railway property, 699.
reluctance of the courts to act herein, 699.
adequacy of legal remedies as affecting, 700.
grounds for appointing, 701.
insolvency, 702.
default in payment of interest or principal, 703.
the existence of right of foreclosure, 704.
internal corporate disagreements and derangements, 705.
failure to run trains, 706.
danger of lapse of valuable land grant, 707.
disputes between railways as tenants in common, 707.
by what court appointed, 708.
conflict of jurisdiction, 709.
priority in obtaining jurisdiction, 710.
time of appointment, 711, 712.
before answer, 712.
not pending plea to jurisdiction, 712.
selection of, 713.
in discretion of court, 713.
appeal from, 713.
the New York rule, 714.
the federal rule, 714.
eligibility, 715.

Receivers—(*continued*).
bonds to be given by, 716.
not required in all cases, 716.
consent of parties, 716.
effect of appointment, 717.
upon rights of litigants, 717.
upon rights of third parties, 717.
upon corporate powers, 718.
upon pending litigation, 718.
upon corporate liabilities, 719.
for damages occurring during his management, 719.
for negligence of his employees, 719.
for crimes and misdemeanors of his employees, 719.
for taxes, 719.
removal of, 720.
discharge of, 721.
upon payment of amount due by defendant, 722.
by consent, 723.
disposition of property upon, 724.
function of, 725.
to be exercised impartially, 725, 726.
hold for benefit of all parties until after decree, 726.
title of, 727.
possession of, 728.
interference with, 729.
by violence or threats, 730.
by "strikes," 730.
by suit, 731.
suits against, 731.
leave to sue in another court, 732.
when leave to sue unnecessary, 733.
rights and duties of, 734.
to institute suit, 735.
general leave in order of appointment, 736.
in another court, 737.
as to existing contracts, 738.
as to stale claims, 739.
as to specific performance of contracts, 740.
as to rescission of contracts, 740.
to collect subscriptions, 741.

Receivers—(*continued*).
rights and duties of, to enter into new contracts, 742.
discretion herein, 743.
to lease other lines, 744.
to sell securities pledged as indemnity, 745.
to manage the road, 746.
Act of Congress of March 3, 1887, 746.
to employ counsel, 747.
to compensation for services, 748.
to borrow money and issue certificates therefor, 749. See RECEIVERS' CERTIFICATES.
liabilities of, 746, 760, *et seq.*
under Act of Congress of March 3, 1887, 746, 764.
in official capacity, 760.
for breach of trust, 761.
to what court amenable, 762.
under Interstate Commerce Act, 764.
Receivers' Certificates, the right to issue, 749.
for what purposes legally issued, 749.
to preserve property from destruction, 749.
for operating expenses, 750.
for equipment, 750.
for repairs, 750.
for payment of employees, 751.
for materials and supplies, 751.
for completion of road, 752.
priority of lien of, 753.
notice to parties, 754.
express consent of parties not essential, 755.
order authorizing, strictly construed, 756.
order authorizing, pending appeal, subject to review, 757.
non-negotiable nature of, 758.
irregularly issued, 759.
issued without consideration, 759.
Rescission. See SUBSCRIPTIONS TO STOCK.
Redemption of railway property after entry under mortgage, 694.
Reduction of Capital Stock, authority to effect, dependent upon statute, 315.
injunction to restrain, 315.
return of stock distributed, 315.

Reduction of Capital Stock—(*continued*).
when legislature may authorize, 317.
unanimous consent of shareholders, 317.
when requisite, 317.
when not requisite, 317.
vested rights of creditors not to be impaired, 3[illegible]
general statutes authorizing, 318.
New York Laws of 1850, ch. 140, 320.
strictly construed, 322.
legislative grant vests in shareholders, 323.
manner of effecting, 324.
effect of, upon liability of shareholders, 327.
Refusal to Carry, liability of railways for, 854.
exceptions to, 854.
measure of damages for, 946.
Register of Shareholders, inspection of, 408.
Registration of Transfers, remedy of unregistered transferee to recover dividends, 294.
as affecting payment of dividends, 305.
infant cannot compel, when, 331.
power of attorney for, not revoked by death, 345.
bill in equity by vendor to require transferree to be registered, 350.
in breach of trust, 358-363.
liability of corporation permitting, 358-363.
essential to complete transfer, 371.
effect of, to give notice to third parties, 371.
not requisite as between parties to transfer, 371.
for what purposes requisite, 372.
to relieve transferrer from liability, 372.
for calls, 372.
recourse upon transferree for calls, 373.
to corporate creditors, 372, 424.
to vest transferree with rights of shareholder, 374.
to protect transferree from creditors of transferrer, 375.
the New England rule, 375.
contra in New York, 376.
and in federal courts, 376.
and in England, 376.
to protect transferree from fraud of transferrer, 377.
for information and protection of corporation, 378.

Registration of Transfers—(*continued*).
formal requisites of, 379.
assignments in insolvency, how registered, 379, 380.
English method, 380.
when shares are transmitted, 380.
transfer prior to incorporation or issue of certificates, 381.
notification and demand for registration, 382.
surrender of old certificates, 383.
essential to protection of corporation, 384.
in what books to be recorded, 385.
dates only from actual entry upon record, 386.
waiver of, 387.
when the company may refuse, 388.
discretion of directors herein, 388.
during closing of transfer books, 388.
after winding-up order, 388.
for security of lien upon stock, 389–393.
no lien at common law, 389.
creation of lien by charter or statute, 389.
creation of lien by by-law, 390.
extent of lien, 391–393.
enforceable for benefit of company alone, 394.
waiver of lien, 395.
where there is doubt as to rights of two claimants, 397.
when the company may delay, 396.
to investigate identity, 396.
to investigate genuineness of power of attorney, 396.
liability for unreasonable delay, 396.
conflicting claimants, 397, 400–403.
interpleader, 397.
whether company may inquire into purpose of transfer, 398.
liability for failure or refusal to register, 399.
refusal of, does not affect title of transferee, 400.
outstanding certificates, 400.
rights and remedies of holders of, 400-403.
against transferrer, 400.
against corporation, 401.

Registration of Transfers—(*continued*).
outstanding certificates, rights and remedies of holders of, against corporate officers, 401.
as affecting liability to corporate creditors, 424.
Regulations. See RULES AND REGULATIONS.
Re-issue of Shares, after forfeiture, 181.
Release. See SUBSCRIPTIONS TO STOCK.
Removal of Causes Act. See SUITS BY AND AGAINST CORPORATIONS, and RECEIVERS.
Reorganization, as a business arrangement, 765.
by renewal of charter, 765.
by transfer of assets, 765.
by proceedings in equity to foreclose, 765.
of purchasers at foreclosure sale, 765.
admission of old shareholders and unsecured creditors, 765.
schemes for, promoted by courts, 765.
statutes regulating, 766.
the New York statute, 767.
provisions of plan to be strictly followed, 768.
laches as a bar to rights of shareholders and bondholders, 769.
power of majority of bondholders, 770.
fraud in, 771.
wherein consists the change of corporate identity, 772.
franchises and obligations of new company, 773.
new company not liable for debts of old, 774.
Repeal of Charter, distinguished from forfeiture, 595.
effect to dissolve corporation, 595.
reservation of right to repeal by the State, 595, 596.
of companies formed under general acts, 596.
reserved right may be exercised summarily, 596.
judicial decree not prerequisite, 596.
relief against wanton exercise of, 596.
Reports, misrepresentations in, inducing subscription, 133.
inducing purchase of shares, 353.
Representations (Fraudulent). See SUBSCRIPTIONS TO STOCK.
Residences, condemnation of, 814.
of lands upon abandonment of right of way, 792.

Restrictions upon Liabilities of Carriers, respecting through shipments, 919, 920, 955.
connecting carriers not entitled to benefit of, 919.
for delay, 933.
for "leaks and outs," 934.
for injuries to live-stock, 936.
reasonableness of, 952, 962.
not to be unusual, 952, 962.
for negligence, 953.
contrary to public policy, 953.
how far permissible in New York, 954.
contracts imposing, strictly construed, 956, 959.
reduction in rates as consideration for, 957, 958.
validity of, in respect of goods, 957.
invalidity of, in respect of persons, 958.
gratuitous passage as consideration for, 958.
how far sufficient in New York and New Jersey, 958.
contract construed against the carrier, 959.
effect of public notices, 960.
effect of notices in tickets, checks and receipts, 961.
effect of stipulations in bills of lading, 962.
prior verbal contract not merged in bill of lading, 963.
respecting amount of liability, 964.
damages *pro tanto* for partial injury, 964.
respecting manner of presenting claims, 965.
respecting time of presenting claims, 966.
respecting time of bringing suit, 966.
pleading in actions on contracts imposing, 967.
evidence in actions on contracts imposing, 967.
burden of in actions on contracts imposing, 967.
Reversion, of title upon abandonment of right of way, 792.
Right of Way, acquisition of, by purchase, 779.
width of, 786.
statutory regulation of, 787.
whether company's possession is exclusive, 789.
location of, in discretion of company, 790.
change of location, 791.
abandonment and non-user of, 792.
Riparian Rights, no private ownership in lands, 823.
between high and low tide-marks, 823.

Riparian Rights—(*continued*).
no private ownership in lands between high and water-marks on navigable rivers, 823.
injury to, by construction of bridge, 823.
by obstructing access, 823.
by causing gorge of ice, 823.
by causing overflow of water, 823.
liability of railway succeeding to rights of company originally causing injury, 823.
restoration to channel, 823.
destruction of spring, 823.
obstruction of mill-race, 823.
measure of damages for, 823.
Rival Roads. See INTERSTATE COMMERCE.
Rivers. See RIPARIAN RIGHTS, and BRIDGES.
Roadway, duty to keep in repair, 996.
as between lessor and lessee, 1008.
Rolling Stock, contract of purchase by payment of rental, 613.
effect of, as equitable mortgage, 613.
effect of, when not recorded, 615.
whether lien created is superior to mortgage lien, 680.
regarded as affixed to realty, 622.
regarded as personalty, 622.
how far subject to mortgage in general terms, 622.
vendor's lien upon, superior to general mortgage, 624.
Route, location of, in discretion of company, 790. See RIGHT OF WAY.
Rules and Regulations, against riding on locomotives, platforms, etc., 857, 861, 993.
passenger's duty to observe, 860, 861.
as to transfer of tickets, 873.
as to detaching coupons from tickets, 874.
as to exhibition of tickets, 876.
as to procurement of tickets, 877.
expulsion for violation of, 882.
as to baggage, 899, 902.
as to boarding and alighting, 987-989.
Running Privileges, accorded one railway company by another, 531.

Running Privileges—(*continued*),
accorded one company by another, when legal, 531.
authorized by 8 Vict. ch. 20, 531.
compensation for, 532.
effect upon liability for injuries, 1066.
Sabbath Day, traveling upon, as contributory negligence, 977.
Salaries, of corporate officers and agents, 484, 485.
Sale of Franchises, not to be effected without legislative authority, 572.
Sale of Railways, effect upon municipal bonds and subscriptions, 215.
liability of transferee, 216, 572.
performance of conditions by transferee, 216.
distinguished from consolidation, 572.
against dissent of a single shareholder, invalid, 572.
unless expressly authorized by existing statute, 572.
unless authorized by charter, 572.
unless authorized by constitutional amendment of charter, 572.
unless in view of dissolution, 572.
shareholder not to be required to accept stock of purchasing company, 572.
distribution of surplus proceeds after payment of debts, 572.
Sale of Shares. See TRANSFER OF SHARES.
Scire Facias, when appropriate to forfeit charter, 591.
Scrip Dividends, when proper to issue, 284.
rights of holders of scrip certificates, 284.
Season Tickets. See TICKETS.
Secured Creditors. See BONDS, and BONDHOLDERS.
Servants, injuries to, 971. See TORTS.
Set-off, in actions to enforce subscriptions, 139.
against calls, 145.
shareholder not entitled to, 145.
Shareholders, of defectively organized corporation, 25, 28, 122.
liability as partners, 25, 122.
must join in deed to effect valid conveyance, 26.
defined by 8 Vict. ch. 16, 167.
powers of, 404.

Shareholders—(*continued*).
powers of, to accept or reject **amendment of char**
46, 404.
rights of dissenting minority, 46.
to increase capital stock, 46, 323, 404.
to consent to cancellation of **subscriptions**, 11
to make calls, under special **provision of char**
155.
to declare stock dividends, 286.
to reduce capital stock, 323, 404.
to effect any radical change, 404.
to change *termini*, 404.
to mortgage, 404, 609.
to lease, 404.
to sell charter and franchises, 404.
to dissolve corporation, 404.
to make by-laws, 404, 405.
to elect and remove directors, **general officers**, 4
to increase or diminish number of **directors**, 4
to declare dividends in England, 404.
to supply vacancies among directors, 464.
right to inspect corporate books, 406–410. See CO
PORATE BOOKS.
right to sue, 411.
to remedy *ultra vires* acts, 411.
to remedy unauthorized acts of **directors**, 411.
to remedy frauds of directors, officers and agents
412.
representative actions, 413.
laches as a bar, 414.
right to sue and defend in corporate **name**, 415.
upon refusal of managers to act, 416.
where wrong-doers are managers, 417.
where wrong-doers are majority, 417.
what interest in stock entitles to, 418.
personal liability of, 45.
not to be increased by amendment of **charter**, 45
not dependent upon possession of **certificate**, 61
to full par value of shares, 93.
upon stock issued for less than par, 252.
the American rule, 252, 266.
the New York statute, 266.

hareholders—(*continued*).
personal liability of, the English rule, 254, 267.
none upon spurious stock, 277.
effect of reduction of capital stock, 327.
to corporate creditors, 419.
extent of, 420.
for laborers' wages, 424.
futility of attempts to avoid, 422.
upon stock issued at less than par, 93, 423, 424.
upon stock issued for property or services, 423, 424.
dependent upon registration, 424.
secondary to liability of corporate assets, 425.
when creditors need not await return of *nulla bona*, 426.
judgment against corporation conclusive, 427.
enforcement of, 428.
by action at law, 428.
by bill in equity, 429.
call not prerequisite, the company being insolvent, 430.
statutes of limitation, 431.
powers to be exercised only in meeting assembled, 432. See SHAREHOLDERS' MEETINGS.
Shareholders' Meetings, shareholders can exercise powers only at, 432.
time of, 433.
postponement, 434.
adjourned meetings, 434, 461.
place of, 435.
when designated by charter or by-laws, 435.
in foreign State, 28, 50, 52, 435, 436.
acceptance of charter at, invalid, 28.
legislative sanction of, 50.
when proceedings voidable, 52, 435, 436.
when proceedings valid, 52, 436.
when incorporated by several States, 435.
voting at, not dependent upon possession of certificate, 61.
by pledgee of shares, 335.
duty of, to regard wishes of pledgor, 335, 444, n. 3.

Shareholders' Meetings (*continued*).
voting at, by pledgor upon proxy, from p. 335.
by pledgee, until pledgee be registered, 444.
is upon shares, not as individuals, 443.
running scale restricting, 443.
exclusion of foreign shareholders, 442.
who entitled to, 444.
registration sole evidence of, 444.
contra, 444, n. 2.
trustees, 444, n. 3.
executors and administrators, 444, n. 3.
pledgors and pledgees, 444, n. 3.
partners, 444, n. 3.
the New York statute, 445.
8 Vict. ch. 16, 445.
idiots and infants, 447.
upon stock held by corporation, 446.
by proxy, 447. See PROXIES.
extraordinary meetings, 437.
provisions of 8 Vict. ch. 16, 437.
notice of, 438.
when requisite, 438.
to be issued by authorized officer, 439.
when to specify object of meeting, 440.
service of, 441.
waiver of, 442.
powers of majority, 448.
what constitutes a majority, 449.
minority representation, 450.
what constitutes a quorum, 449.
cumulative voting, 450.
combinations to control, 451. See COMBINATIONS AMONG SHAREHOLDERS.
bribery to influence vote, 452.
to procure proxy, 452.
irregularities and illegal proceedings, 453, 461.
waiver of, 454.
presumption of *omnia rite acta*, 455.
mandamus to compel calling of, 461.
exhibition of books and papers at, 461.
failure to hold, not *per se* a dissolution, 574.

Shares of Stock—(*continued*).
state ownership of, effect upon private nature of company, 23.
increase in par value of, 48.
amendment of charter authorizing, 48.
increase in capital stock not to be effected by, 315.
definition of, 60.
distinguished from stock certificates, 61.
are personal property, 62.
status of, under statutes of mortmain, 62.
under English Factors Act, 62.
under 13 Elizabeth, ch. 5, 62.
under Statute of Frauds, 62, 340.
under English Bankruptcy Act of 1883, 62.
the several kinds, 63.
common stock, 63.
deferred stock, 63.
overissued stock, 63.
spurious stock, 63.
preferred or guaranteed stock, 63. See PREFERRED STOCK.
guaranteed stock, 63, 64.
synonymous with preferred stock, 63, 64.
special stock, 68. See SPECIAL STOCK.
interest-bearing stock, 69.
characteristics of, 69.
status of holders of, 69.
watered or fictitious stock, 70. See FICTITIOUS STOCK.
subscriptions to. See SUBSCRIPTIONS TO STOCK.
agreements to issue at less than par, 93.
decrease in par value, reduction of capital stock not to be effected by, 315.
transferable nature of, 328.
sales and transfers of. See TRANSFER OF STOCK.
quasi-negotiable nature of, 329. See TRANSFER OF STOCK.
lien of corporation upon, 389, 390.
none at common law, 389.
creation of by statute, charter, by-laws or usage, 389, 390.

Shares of Stock—(*continued*).
lien of corporation, extent of, 391–393.
enforceable for benefit of company alone, 394.
waiver of, 395.
Signals of Warning, duty of railway to give, 969, 9[illegible] 990.
Sleeping-car Companies, liability for injuries to passengers, 1007.
f[illegible]r passengers' effects, 911, 912.
Smoke, as element of damage to lands not taken, 8[illegible] 811, 818.
Sparks. See FIRE.
Spark Arresters. See LOCOMOTIVES.
Special Charters, prohibited by State constitution[illegible] 32.
Special Contracts, for transportation of goods wh[illegible] carrier does not profess to carry, 913.
restricting liability. See RESTRICTIONS UPON LIABILITIES OF CARRIERS.
Special Stock, definition and characteristics of, 68.
liability of holders, 68.
redemption of, 68.
amount of, limited, 68.
statutory formalities requisite to issue, 68.
dividends upon, 68, 292.
guaranty of, not dependent upon profits, 292.
to be paid at all events, 292.
status of holders as creditors, 292.
Specific Performance, of contract to issue shares, 9[illegible]
of contract for transfer of shares, 349, 350.
Spurious Stock, definition of, 63. See OVERISSUED STOCK.
Station Agent, authority to bind company, by acceptance of goods, 914.
State Ownership, of shares, effect upon railway as private corporation, 23.
Statute of Frauds, shares as goods, wares and merchandise under, 62, 340.
Statute of Limitations, special contracts by carriers prescribing shorter time than, 966.
Statutory Liens, in favor of laborers and mechanics, 676.

atutory Provisions, concerning incorporation. See GENERAL INCORPORATION LAWS.
fictitious stock, 71.
form of subscription contract, 74.
manner of taking subscriptions, 82-84.
cash deposits upon subscribing, 126, 127.
atutory Remedy, for injuries resulting in death,
ock. See CAPITAL STOCK, and SHARES OF STOCK.
ock Book. See CORPORATE BOOKS.
ock-brokers, who competent to act as, 338.
liability of, when customer is incompetent, 338.
contracts of, 338.
formalities of, 338.
on English exchange, 338.
usages of, 338.
not to deprive parties of legal rights, 338.
sub-purchasers, 338.
intermediate sales, 338.
enforcement of contract by ultimate purchaser, 338.
authority to bind principal, 338.
discharge from liability, 338.
guaranty of registration by, 338.
to obey specific orders of customer, 339.
implied authority of, 339.
time for execution of orders, 339.
not to buy or sell to himself, 339.
indemnification of, 339.
may sign memorandum to bind both parties, 340.
Stock Dividends. See DIVIDENDS.
Stock Exchanges, usages of, governing sales of stock, 338.
not to deprive parties of legal rights, 338.
Stockholders. See SHAREHOLDERS.
Stock-jobbers. See STOCK-BROKERS.
Stoppage in Transitu, carriers by rail subject to common law in respect of, 937.
when right of, arises, 937.
right of, lost by delivery, 937
actual, 937.
constructive, 937.
by consent of railway to hold as warehouseman, 937.

Stoppages in Transitu, continued.
right of constructive, by delivery of part, 937.
Stop-over Tickets. See TICKETS.
Streams. See RIPARIAN RIGHTS.
Street Cars, injuries to passengers, 973, 987.
alighting from front platform, 987.
riding on front platform, 987.
Streets and Highways, power of railways to cross, 802, 803.
consent of abutting land-owners, 804.
changing grade of, 805.
common and special injuries to abutting owner, 806.
remedy of abutting owner, 807.
is against railway, not the city, 607.
taking of, for street railways, 808.
taking of, for elevated roads, 809.
compensation to abutting land-owners, 810, 811.
when fee is in the public, 810.
when the public has only an easement, 811.
damages for wrongful taking, 812.
"Strikes," as affecting carrier's obligation to receive and carry, 926.
to deliver promptly, 926.
liability of railway employees for, 929, 932.
when road in hands of receiver, 730.
contempt of court, 730.
Subscriptions to Stock, form of the contract, 73.
irregularities in the contract, 73, 74.
statutory requirements respecting form of the contract, 74.
by signing articles of association, 75.
in escrow, 76.
admissibility of parol evidence to show conditional nature of, 76.
in blank, 76, 77.
admissibility of parol evidence respecting, 76.
by parol, 77.
by implication of law, 78.
from irregular subscription, 78.
from accepting certificate, 78.

Subscriptions to Stock — (*continued*)
by implication from participation in corporate meeting, 78.
from serving as director, 78.
contracts of, are several, 79, 123.
liability upon, 93.
to be separately construed, 79.
to be independently enforced, 125.
competency to make, 80.
natural persons, 80.
municipal corporations, 80.
private corporations, 80.
corporate officers, 80.
commissioners, 80.
not to allow themselves priority, 80.
railway companies, 81.
not to subscribe to stock of other railways, 81.
not to subscribe to their own stock, 81.
method of taking, 82.
the New York statute, 82.
the English statute, 8 Victoria, 16, 83.
commissioners, 84. See COMMISSIONERS TO TAKE SUBSCRIPTIONS.
acceptance of, by corporation, 85, 87.
when requisite to bind subscriber, 85.
taken by unauthorized agent, 85.
prior adoption of by-laws, 85.
irregularity in method of making, 85.
prior to incorporation, 86.
estoppel from denying, 86.
promise to pay for shares, 87.
whether implied from subscription, 87.
call necessary to render absolute, 150.
consideration of the contract, 88.
distinguished from motive for making, 88.
payment of in property, 89.
at an overvaluation, 89.
extension of credit upon, 89.
effect of, upon liability of subscriber, 89.
cash deposits at time of making, 82, 90.
checks and notes in lieu of, 90.
failure to take, 90.
effect of, upon liability of subscriber, 90.

Subscriptions to Stock—(*continued*).
liability upon, released by refusal to issue certific
in excess of capital stock, 92.
apportionment between subscribers in case
liability upon, for full face value of stock, 93.
notwithstanding agreement to contrary, 93.
exceptions to general rule, 93.
26 & 27 Vict. ch. 118, 93.
30 & 31 Vict. ch. 127, 93.
32 & 33 Vict. ch. 48, 93.
upon conditions, 94, *et seq.* See CONDITIONAL S
SCRIPTIONS.
cancellation of, 114.
consent of the subscriber, 115.
consent of the corporation, 115.
consent of corporate creditors, 116.
no authority in directors to cancel, 117.
rescission of, 118.
mistake as a ground for, 118.
release from, 120.
effect of fundamental amendment of charter.
120, 121.
effect of irregularity in incorporation, 122.
effect of illegal acts of corporate managers,
effect of failure or refusal to issue certificate,
effect of releasing other subscribers, 125.
effect of secret concessions to others, 125.
effect of failure to make cash deposit, 126,
the New York and Pennsylvania rule,
effect of promoter cutting his name from s
scription book, 129.
not to be varied by parol, 128.
fictitiously made to influence others, 129.
subsequent erasure, 129.
fraudulent misrepresentations inducing, 130.
subscriber's remedy, 130.
effect of *laches*, 130, 143, 144.
not to be plead to prejudice of others, 130.
parol evidence to show, 130.
liability of promoters for, 130.
facts to be shown in support of allegation of, 131.
authority of agent making, 132.

Subscriptions to Stock – (*continued*).
fraudulent misrepresentations, contained in prospectus or report, 133.
by suppression of truth, 134.
by statement of what is not *known* to be true, 134
respecting matters equally known to both parties, 135.
matters of opinion, 136.
matters of law, 137.
material matters, 138.
immaterial matters, 138.
set-off and counter-claim in actions to enforce, 139.
when corporation is insolvent, 139, 144.
when corporation is solvent, 139.
extinguishment of, by abandonment of enterprise, 140.
limitation upon, 141.
runs from demand of payment, 152.
miscellaneous defenses to actions to enforce, 142.
waiver of, 143.
corporate insolvency a bar to, 144.
payment of, before call, 147.
not to be assigned or mortgaged before call, 158.
to overissued stock, 277.
no liability thereon, 277.
as affected by consolidation, 546.
collection of, by receivers, 741.
Suits by and against Corporations, in foreign State, 50, 53, 54.
service of process upon, 50.
created by more than one State, 53.
jurisdiction of federal courts over, 53.
jurisdiction of State courts over, 53.
Removal of Causes Act, 53, 54.
Surplus Earnings, synonymous with "net profits," 301. See PROFITS.
Surplus Lands, power to hold, 26.
to be questioned only by State, 26.
mortgage of, 603, 617, 620.
Surrender of Charter, dissolution by, 578.
authority and duty of directors respecting, 579.
acceptance of, by the State, 580.

Surrender of Shares, whether effective to relieve holder from liability, 172.
Survey (Preliminary), entry upon lands for, "taking," 782.
"Taking," of private property for public use, 782.
what constitutes a "taking," 782.
Tank-cars, preference to shippers of oil in, 1041.
Tariffs. See TOLLS AND TARIFFS.
Taxation, of capital stock, exempt under charter, illegal, 45.
in aid of railways. See MUNICIPAL AID.
of railway property for municipal aid to railways, the New York statute, 227.
recovery of tax, the bonds being void, 227.
exemption from, 555.
as affected by consolidation, 555.
effect of appointment of receiver, 719.
indirect State control of commerce by. See INTERSTATE COMMERCE.
"Tax-Payers," construction of, in acts authorizing municipal aid, 208, 209.
Temporary Occupation, of lands for preliminary survey not a "taking," 782.
Tenants for Life, right to compensation for taking land, 793.
Tenants in Common, apportionment of damages for taking of lands between, 793.
not to impair each other's right to compensation, 793.
Tenants in Tail, right to compensation for taking land, 793.
Tender. See TRANSFER OF STOCK.
Terminal Charges, as affecting legality of discrimination in rates, 1031.
not included in statutory maximum rate, 941.
Terminal Points. See INTERSTATE COMMERCE.
Through Tickets. See TICKETS.
Through Trains, whether company must stop for local travel, 868.
Tickets, nature of, as vouchers or receipts, 869.
as evidence of terms of contract of carriage, 870.
limited as to time, 871.
stop-over privilege, 872.

kets—(*continued*).
non-transferable, when, 873.
with coupons attached, 874.
season or commutation tickets, 875.
to be exhibited, when, 876.
failure to procure, 877.
additional charge for, 877.
conductor's checks given in lieu of, 878.
through tickets, 874.
cket Office, closing of, as affecting passenger's duty to procure ticket before entering train, 877.
idal Lands. See RIPARIAN RIGHTS.
imber Lands. See EMINENT DOMAIN.
ime Tables, duty of railway to observe, 865.
itle to Right of Way, whether an easement or fee, 784.
olls and Tariffs, restrictions upon charges in charter not applicable to lessee of railway, 568.
lien upon goods to secure, 939.
payment in advance, 940.
excessive charges, 941.
unjust discrimination, 941.
reduction of, in consideration of release from liability, 957, 958.
gratuitous passage in consideration of release, 958.
See INTERSTATE COMMERCE.
Torts, injuries by fire, 968.
emission of sparks from locomotive, 968.
presumption of negligence, 968.
contributory negligence of owner, 968.
accumulation of grass on right of way, 968.
failure to provide spark arresters, 968.
evidence of previous fires from same locomotive, 968.
injuries to cattle, 969.
liability for, regulated by statute, 969.
signals of warning, 969.
burden of showing due care to avoid, 969.
contributory negligence of owner, 969.
fence laws, 969.
effect of, to shift burden of proof, 969.
recent defect in fence, 969.

Torts (*continued*).
injuries to strangers, 970.
distinction between, and injuries to passengers, 970.
legally upon the company's premises, 970.
crossing or walking along railway track, 970.
under license, 970.
as trespassers, 970.
signals of warning, 970.
contributory negligence, 970.
in city streets, 970.
at highway crossings, 970.
measure of damages, 970.
injuries to servants, 971.
assumption of risk of employment, 971.
negligence of master to be proven, 971.
patent dangers, 971.
latent dangers, 971.
safe instrumentalities, 971.
continuance in service with knowledge of danger, 971.
carried free to and from work, 973.
injuries to passengers, 972–1009. See INJURIES TO PASSENGERS.
injuries resulting in death, 1010.
damages not recoverable at common law, 1010.
Lord Campbell's Act, 1010.
American statutes, 1010.
survival of action and creation of new remedy distinguished, 1011.
liability of mortgage trustees operating railway, 6[illegible].
liability of lessor and lessee, 569.
effect of unauthorized lease, 570.
liability of receiver operating the road, 719.
Traffic Agreements and Associations, as affecting liability of initial carrier, 914.
for transportation beyond *termini*, 530.
legality of, 530.
not revocable at pleasure, 530. See RUNNING PRIVILEGES.
Trains, running of, through streets, when not a nuisance, 803.

nways. See STREET CARS.
nsfer Books, closing of, prior to payment of dividends, 305.
regarded as legal, 305.
declared legal by 8 Vict. ch. 16, 388.
register of transfers required by 8 Vict. ch. 16, 385.
entry on stock ledger sufficient in America, 385.
entry on stub-book from which new certificates are cut, 385.
ansferees, right of, to dividends, 303.
liability to refund dividends illegally paid, 314.
rights of, founded in estoppel, 330.
not upon negotiable nature of stock, 330.
infant cannot compel registration, when, 331.
rights and remedies of, the certificates outstanding, 400-403.
remedy against transferrer, 400.
remedy against corporation, 401.
remedy against corporate officers, 401.
ransfer of Stock, not dependent upon possession of certificate, 61.
status of transferree of stock issued below par, 268.
his remedy, 268.
when affected with knowledge, 269.
his liability, 270.
of spurious stock, 279.
injunction to restrain, 279.
remedy of transferree against transferrer, 280.
measure of damages, 281.
as affecting right to dividends, 303.
no apportionment between vendor and vendee, 303.
when deliverable *in futuro*, 303.
right of alienation incident of ownership, 328.
by gift, 328.
by will, 328.
by succession, 328.
delivery sufficient to effect, 328.
by contract, 329.
quasi-negotiable nature of shares, 329.
rights of *bona-fide* purchaser, 330.
founded in estoppel, 330.

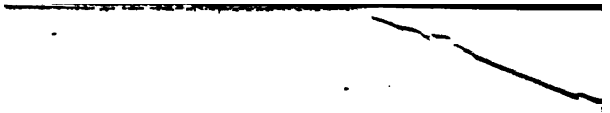
Transfer of Stock—(*continued*).
competency of parties to contract, **331.**
of railway companies, 81, **331.**
natural persons, 331.
infants, 331.
paupers, 331.
married women, 331.
corporations, to buy own shares, **332.**
the English rule, 332.
the American rule, 333.
the New York statute, **333.**
by mortgage and pledge, 334.
need not be in writing, **334.**
parol evidence to show, **334.**
rights of pledgee, 335.
holder of certificate superior to transferee without, 335.
as shareholder, 335.
to dividends, 335.
duty of pledgee to vote according to wishes of pledgor, 335, 444, n. 3.
liability of pledgee to corporate creditors, **335.**
whether pledgee may sell and repledge, **336.**
redemption of pledge, 337.
forfeiture of pledge, 337.
by bargain and sale, 338.
through brokers, 338, 339. See STOCK-BROKER.
whether within meaning of Statute of Frauds, 62, 340, 341.
consideration, what sufficient, 341, **343.**
seal unnecessary, 342.
uneffective when affixed, **342.**
warranty of title, 343.
tender, 344.
assignment in blank, 345.
with power of attorney to register, **345.**
power of attorney not revoked by death, **345.**
assignment by deed, 346.
under 8 Vict. ch. 16, **346.**
acceptance, 347.
requisite to render transferree liable, **347.**
how shown, 347.

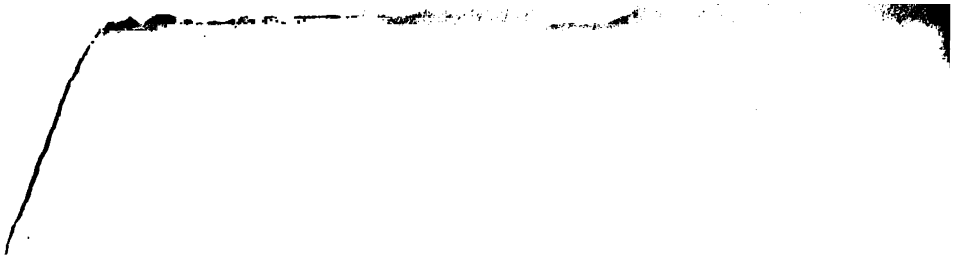
Transfer of Stock—(*continued*).
delivery, 348.
time of, need not be expressed, 348.
reasonable time implied, 348.
usage as to, 348.
specific performance of contract for, 349, 350.
whether equity will enforce, 349, 350.
when vendor does not own shares, 350.
decree to enforce registration by purchaser, 350.
at instance of vendor, 350.
damages for breach of contract for, 350.
recoverable in action seeking specific performance, 350.
defenses to action to enforce contract for, 351.
fraud as affecting, 352.
misrepresentations inducing, 352.
in reports and prospectuses, 353.
circumstances from which fraud not presumed, 354.
remedies of party defrauded, 355.
in breach of trust, 356, 357.
by ordinary trustee, 356, 357.
liability of corporation, 358.
by executors and administrators, 359.
liability of corporation, 360.
by guardians, 361.
by agents, 362.
by assignees in insolvency, 363.
of lost or stolen certificates, 364.
innocent purchaser derives no title, 364.
effect of registration and issue of new certificates, 364.
right of owner to have new certificates, 364.
negligence of true owner, 365.
by forgery, 365-367.
duty of corporation respecting registration, 365.
remedy of real owner, 366.
negligence as a bar to, 367.
no title to be founded on, 368.
purchaser's remedy, 368.
speculative and wager contracts for, 370. See WAGER CONTRACTS.

Transfer of Stock—(*continued*).
registration of, 371. See REGISTRATION OF TRANSFER.
when registration impossible, 381.
prior to incorporation or issue of certificates, 3
notification to company, 382.
Transportation Companies, as common carriers, 9
as private carriers, 913.
liability of, for acts of sub-carrier, 919.
Travelers. See PASSENGERS.
Trees, injuries to, as element of damage to lands a
taken, 818.
Trespass, constructing railway without condemnatio
lands, 830.
the land-owner's remedies, 830.
measure of damages, 831.
Trespassers, upon trains, 881.
expulsion of, 881.
upon right of way, liability of railway for injuries to
970.
Trust Certificates, issued in lieu of shares deposited, 45
transferable, nature of, 451.
Trustees, transfer of stock by, in breach of trust, 356,
357.
liability of corporation permitting, 358.
right to vote at shareholders' meetings, 444, n. 3.
transfer of shares to, 451.
to control corporation, 451.
"**Trusts**." See COMBINATIONS AMONG SHAREHOLDERS, and COMBINATIONS BETWEEN CORPORATIONS.
Turnpikes, injuries to persons on, at railway crossings, 970.
Ultra Vires Acts, character and purposes of corporation, 27, 29, 506.
determined by charter, 27, 29, 506.
express powers, 29, 506.
necessarily implied powers, 29, 507.
examples of, 508, 509.
as to fostering other enterprises, 510, 511.
powers not necessarily implied, 512.
examples of, 512.
no operation to release subscription to capital stock, 123.

Ultra Vires Acts—(*continued*).
legislation purporting to cure, 195.
suit by shareholders to remedy, 411.
apparently *infra vires*, 513.
infra vires acts rendered *ultra vires*, 514.
by manner of performance, 514.
by purpose of performance, 515.
by extent of performance, 516.
borrowing money in excess of charter limit, 516.
personal liability of directors for, 517.
who may plead, 518.
single dissenting shareholder, 518.
corporate creditors of failing concern, 519.
other contracting party until performance, 520.
consideration of contract to be surrendered, 521.
ratification and acquiescence in, 522.
acceptance of fruits of, 523.
laches a bar to pleading, 524.
distinguished from illegal acts, 525. See ILLEGAL CORPORATE ACTS.
quo warranto proceedings, 534.
recovery of rent upon *ultra vires* lease, 571.
issuing bills of exchange, 605.
overdrawing bank account, 605.
mortgaging without legislative authority, 663.
remedial legislation, 610.
injunction to restrain, 611.
"Undertaking" (The), mortgage of. See MORTGAGES.
Undue Preference. See TOLLS AND TARIFFS, and INTERSTATE COMMERCE.
Unequal Facilities, for passengers, 855.
for freight, 943.
Unpaid Stock, a trust fund for corporate creditors, 144, 252, 253, 422.
Unreasonable Preference. See TOLLS AND TARIFFS, and INTERSTATE COMMERCE.
Unsecured Creditors, claims of, subordinate to mortgage by consolidated company, 554, 562.
liability of consolidated company to, 560, 561, 562.
remedy against consolidated company, 563.

User of Corporate Powers, presumption of corporate existence from, 25.
Vacation of Charter. See FORFEITURE OF CHARTER.
Valuation of Goods. See BILLS OF LADING.
Vendor's Lien, for rolling stock, 622.
for lands, 678.
Vested Rights, of railways, as private corporations, 2.
not to be impaired by adoption of new State constitution, 41.
constitutional guaranties of, 42.
of corporate creditors, 317.
not to be impaired by statute authorizing reduction of capital stock, 317.
Vesting of Title, in right of way, time of, 847.
Vice (Inherent). injuries to goods from, 922.
Vice-Presidents. See PRESIDENTS OF CORPORATIONS.
Voting, upon spurious stock, 279.
injunction to restrain, 279.
cumulative, 450. See SHAREHOLDERS' MEETINGS.
Wager Contracts, for sale of shares of stock, 370.
void as against public policy, 370.
futility of legislation against, 370.
criterion of determining nature of, 370.
liability of directors gambling in securities, 497.
Wages, personal liability of shareholders for, 424.
Warehousemen, railway companies as, 914, 924.
liability of, for negligence, 924.
duty of, in respect to stoppage *in transitu*, 937.
Water-Competition. See INTERSTATE COMMERCE.
Water Courses. See RIPARIAN RIGHTS.
Watered Stock. See FICTITIOUS STOCK.
Way. See RIGHT OF WAY.
Weight, limit of. See BAGGAGE.
Whistles. See SIGNALS OF WARNING.
Wife. See MARRIED WOMEN.
Winding-up. See DISSOLUTION.
Witnesses, opinions of, as to value of lands, 840.
Working Agreements. See TRAFFIC AGREEMENTS.





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